Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

KONRADS KALEJS,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Dated: January 31, 1994

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78 pp

QUESTIONS PRESENTED

1. Whether video taped depositions taken in the late 1980s inside of the Soviet Union and presided over by a Soviet procurator are admissible in a deportation hearing, or alternatively, are they sufficient as a basis for reasonable, substantial and probative evidence, when neither the United States Office of Special Investigations (government attorneys, hereinafter "OSI") nor Petitioner, Kalejs, (hereinafter "Kalejs") were allowed by the Soviets to (a) interview any of the Soviet prepared witnesses prior to the taking of the depositions; (b) nor possess, review or use on examination or cross examination admittedly existing prior statements of the witnesses given shortly following the end of World War II; (c) nor afforded free movement in Soviet countries to the visit sites and seek witnesses; and (d) each, including OSI's key expert witness, were

barred from admission to, and research at, the Soviet Archives that contained relevant documents and prior statements of the witnesses which now prove exculpatory?

2. Whether, in a deportation case, under the principle of Brady v. Maryland, 373 U.S. 83 (1963), OSI was obligated to produce to Kalejs a book published in the Soviet Union one page of which OSI introduced into evidence which names the Commander of the external guard of Salaspils and Sauriesi Concentration Camps, but does not mention the name, Kalejs, where OSI alleged and Kalejs was found to be the Commander of the external guard of the camps?

3. Where OSI over a course of many years has had cooperation of a totalitarian government whose discretion is unfettered in the choice of documents and witnesses used in a U.S. tribunal for the purpose of deporting a resident of a Unit-

ed States, and the totalitarian government refused to cooperate with the defense, and that totalitarian government is dissolved subsequent to the hearing and first appeal ordering deportation and Kalejs is now able to interview witnesses, visit sites and research in those formerly closed foreign archives and Kalejs has made a showing that additional evidence in proper form favorable to the defense will become available, whether Kalejs should be afforded an opportunity to obtain and present favorable evidence?

4. Whether the opinion testimony of Dr. Hilberg that Kalejs was a member of Arajs Kommando based solely upon his general knowledge of Holocaust history, documents provided from Germany that went only to the deeds of Arajs Kommando, and several Soviet selected documents naming Kalejs as a member of Arajs Kommando that Hilberg himself admits were less compelling when

not produced in context and allegedly existing but unproduced Soviet documents constitutes reasonable, substantial, probative evidence sufficient to affirm the decision or whether his opinion was based principally on absent documents and an absent statement of one Abols, alternatively, whether Hilberg's opinion testimony that Kalejs was a member of Arajs Kommando was not a proper subject of expert testimony and inadmissible?

5. May a person be deported under the Holtzman Amendment, 8 U.S.C. Sec. 1251(a)-(4)(D), as one who, under the direction of the Nazi regime, "ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion," without proof that he personally committed war crimes or any atrocities?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS v

SEPARATE APPENDIX vii

STATUTORY PROVISIONS INVOLVED vii

TABLE OF AUTHORITIES viii

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

STATEMENT OF THE CASE 3

I. INTRODUCTION: HISTORY OF THE CASE, ALLEGATIONS, AND FINDINGS BELOW 3

IA. INTRODUCTION 4

IB. PRIMARY CHARGES AND ISSUES 4

IC. DETAILED ALLEGATIONS AND FINDINGS 7

ID. THE SEVENTH CIRCUIT'S FINDINGS 11

II OSI EVIDENCE 13

IIA SOVIET DEPOSITION EVIDENCE 13

IIB "WESTERN" DOCUMENTS 15

IIC LATVIAN DOCUMENTS 15

IID TESTIMONY OF RAUL HILBERG 16

III NEWLY DISCOVERED EVIDENCE 17

REASONS FOR GRANTING THE WRIT 19

I SOVIET EVIDENCE IS INHERENTLY UNRELIABLE 20

II THE SOVIET DEPOSITION EVIDENCE IS INADMISSIBLE 23

III KALEJS WAS PREVENTED FROM PRESENTING A DEFENSE 37

IV "WESTERN" EVIDENCE IS INSUFFICIENT 40

V NEWLY DISCOVERED EVIDENCE 47

VI LACK OF DISCOVERY AND BRADY ERROR 54

VII THE SEVENTH CIRCUIT'S CONSTRUCTION OF THE HOLTZMAN AMENDMENT CONFLICTS WITH THOSE OF THE SIXTH AND NINTH CIRCUITS 58

CONCLUSION 65

SEPARATE APPENDIX

Opinion of the Court of Appeals
for the Seventh Circuit
(November 17, 1993) APP 1

Decision of the Immigration Court
ordering deportation
November 1, 1988 APP 102

Opinion and Order of the Board
of Immigration Appeals affirming
April 30, 1992 APP 193

Judgment of the Court of Appeals
(November 17, 1993 APP 394

Order of the Court of Appeals
denying petition for rehearing
December 30, 1993 APP 396

Order of the Court of Appeals
granting motion to stay judgment
(January 10, 1992 APP 398

Statutes Cited APP 400

STATUTORY PROVISIONS INVOLVED

United States Constitution:

Amendment V - APP 400

8 U.S.C. Sec. 1105a(a) APP 400

8 U.S.C. Sec. 1105a(a)(4) APP 401

8 U.S.C. Sec. 1105a(c) APP 402

8 U.S.C. Sec. 1182(a) APP 403

8 U.S.C. Sec. 1182(a)(3)(E) APP 404

8 U.S.C. Sec. 1182(a)(6)(C) APP 405

8 U.S C. Sec. 1251(a) APP 406

8 U.S.C. Sec. 1251(a)(1)(B) APP 407

8 U.S.C. Sec. 1251(a)(4)(A) & (D) APP 407

8 U.S.C. Sec. 1252(b)(1) - (4) APP 408

28 U.S.C. Sec. 2347(a) - (c) APP 409

TABLE OF AUTHORITIES

124 Cong. Rec. 31649 (1978) 61

Baumgartner v. United States, 322 U.S. 665 (1944) 64

Brady v. Maryland, 373 U.S. 83 (1963) ii, 54, 57

Demjanjuk v. Petrovsky, 10 F.3d 338, 1993 U.S. App. LEXIS 29694 (6th Cir. 1993) 34, 57, 58

Fedorenko v. United States, 449 U.S. 490 (1981) 60, 61, 62

Green v. McElroy, 360 U.S. 474
(1959) 38
Klapprott v. United States
335 U.S. 601 at 612 (1949) 39
Kowalchuk v. United States,
773 F.2d 488 (3rd Cir. 1985) 21, 22
Kulle v. INS, 825 F.2d 1188
(7th Cir. 1987) 63
Laipenieks v. INS, 750 F.2d 1427
(9th Cir. 1985) 59, 60, 62, 63
Martin-Mendoza v. INS, 499 F.2d 918
(9th Cir 1974) 34
Matter of Laipenieks, A11 937 435,
(Immigration Court, San Diego 1982) 29
Matter of Maikovskis, A8 194 566
(Immigration Court, New York, 1983) 21, 29
Morgan v. United States,
304 U.S. 1 (1938) 38
Nuremberg Trial of the Major
War Criminals, Proceedings
Volumes 7, 9, 17. 22
People v. Arajs, District Court

of Hamburg, 1980, Exhibit 22T 15, 52

Petkiewytsch v. INS, 945 F.2d 871 (6th Cir. 1991) 58, 62, 63

Schellong v. INS, 805 F.2d 655 (7th Cir. 1986) 61, 63

United States v. Hutyrczky, 803 F.Supp. 1001 (D.N.J. 1992) 30, 32

United States v. Kairys, 600 F.Supp. 1254 (N.D.Ill. 1984), aff'd, 782 F.2d 1374 (7th Cir 1986) 31, 61

United States v. Kowalchuk, 571 F.Supp. 72 (E.D.Pa. 1983), 773 F.2d 488 (3rd Cir 1985) 31, 33, 34

United States v. Koziy, 540 F. Supp. 25 (S.D.Fla. 1982) 30, 31, 32

United States v. Kungys, 571 F. Supp. 1104 (N.D.N.J. 1983), 793 F.2d 516 (3d Cir 1986) 21, 31, 32

United States v. Linnas, 527 F. Supp. 426 (E.D.N.Y. 1981), aff'd without opinion, 685 F.2d 427

(2d Cir 1982) 30, 31, 32

United States v. Menasche, 348 U.S. 528 (1955) 64

United States v. Ness, 245 U.S. 319 (1917) 64

United States v. Osidach, 513 F. Supp. 51 (E.D. Pa. 1981) 30, 31

United States v. Palciauskas, 559 F.Supp. 1294 (M.D. Fla. 1983), aff'd, 734 F.2d 625 (11th Cir. 1984) 30, 31, 32

United States v. Riela, 337 F.2d 986 (3d Cir.1964) 40

United States v. Sprogis, 763 F.2d 115 (2d Cir. 1985) 29, 62

United States v. Sprogis, No. CV-82-1804 (E.D.N.Y. 1984) 29

Washington v. Texas, 388 U.S. 14, 87 S. Ct. 1920, 18 L.Ed.2d 1019 (1967) 38, 55

Woodby v. INS, 385 U.S. 276, 17 L.Ed.2d 362 (1966) 39

Soviet Evidence in North American Courts, S. Paul Zumbakis of the Illinois Bar, Americans for Due Process, Chicago (1986) 20

The Secret Offensive, Chapman Pincher, Sidgwick & Jackson Ltd., London (1985) 20

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KONRADS KALEJS, Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Konrads Kalejs, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on November 17, 1993.

OPINIONS BELOW

The Seventh Circuit's opinion of November 17, 1993 is reported at 10 F.3d 441 and reproduced at APP 1. Its judgment of the same date is reproduced at APP 394.

On December 1, 1993, petitioner filed a timely Petition for Rehearing which was denied on December 30, 1993. (Order denying rehearing reproduced at APP 396).

The Seventh Circuit's judgment affirmed orders of the Board of Immigration Appeals dated April 30, 1992 (reproduced at APP 193), which in turn affirmed the decision of the Immigration Court rendered on November 1, 1988 (reproduced at APP 102).

STATEMENT OF JURISDICTION

Jurisdiction in the court of appeals to review the orders rendered by the Board of Immigration Appeals rested upon 8 U.S.C. Sec. 1105a(a).

Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

(i) The judgment sought to be reviewed was rendered on November 17, 1993.

(ii) Petition for Rehearing was denied on December 30, 1993. On January 10, 1994 by agreement with the Office of

the Solicitor General the Clerk of this Court was informed the government will not deport Kalejs, or alter the current status of his custody, pending disposition of the petition for a writ of certiorari, provided the petition is filed with the Court and received by its office on or before February 1, 1994. On January 10, 1994 the Seventh Circuit ordered its judgment stayed until February 7, 1994 (APP 398).

(iv) 28 U.S.C. Sec. 1254. Courts of appeals; certiorari; . . .

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

STATEMENT OF THE CASE

I. INTRODUCTION: HISTORY OF THE CASE,

ALLEGATIONS, AND FINDINGS BELOW

IA. INTRODUCTION

Konrads Kalejs (petitioner, hereinafter "Kalejs") is an eighty year old native of Latvia and a naturalized citizen of Australia. He resided in Latvia from 1914 to 1944 including the period of the German occupation. He was admitted to the United States for permanent residence in 1959 and lived a productive but uneventful life until an Order to Show Cause was brought by the Office of Special Investigations (OSI) in 1984.

IB. PRIMARY CHARGES AND ISSUES

An amended Order to Show Cause was prepared in 1988. It alleged Kalejs was deportable pursuant to now numbered 8 U.S.C. Secs. 1182 (a)(3)(E), 1251(a)(1)(A), 1251-(a)(1)(B), 1251(a)(4)(D). He is ordered deported.

The essential issues are:

1) Whether Kalejs participated in, or

assisted in, persecution under the Holtzman Amendment, and

2) Whether Kalejs made any wilful misrepresentation of a material fact in the application he made in connection with the issuance of his United States visa.

The two issues are interrelated. In the visa application in 1959, Kalejs stated he had been a farm laborer during the war. He had worked from time to time on a farm during the war, however, the statement is incomplete. Kalejs admitted in both an unrepresented precharge sworn statement and in this testimony at trial he served in Latvian military units fighting with the Germans against the Russians. If that was the extent of his wartime activities, he would not have been excluded from entry in 1959. Since, if that were the truth, then it appears that the allegedly false statement (that he was a farm laborer) would not alone have been deemed material

so as to preclude his entry into the United States at that time.[1]

OSI alleges that Kalejs participated in the persecution of Jews and others and was, indeed, a member of a "killing squad," Arajs Kommando, that murdered some 73,000 persons from July, 1941 through December 8, 1941. One can legitimately ask: if the INS had not believed that Kalejs participated in such persecution, would it nevertheless have maintained that he should be deported because of a wilful misrepresentation of material fact on his visa application? The two issues cannot be separated. If the persecution allegations cannot be sustained, then the basis

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[1] Kalejs admitted and the Board of Immigration Appeals found he had served as company commander for the Germans in a Latvia Ski Company fighting the Russians at the Eastern Front in 1942. The Board determined this military duty did not constitute participation in persecution within the meaning of the Holtzman Amendment (APP 324,5). In 1944 Kalejs joined and served in the Latvian Legion of the German SS. This fact did not enter into the decision of the tribunals below.

for determining that the visa misrepresentation was material will be lost.

IC. DETAILED ALLEGATIONS AND FINDINGS

The contested allegations (7-25) relate to three major substantive issues, one of which has several sub-parts.

The first issue was whether Kalejs' membership or activities in an unnamed Latvian self-defense unit at Litene in mid-July, 1941, shortly after the invasion of Latvia by Germany, constituted participation in persecution. The Immigration Judge thought not. BIA made no finding.

The next issue was whether Kalejs was a member of the Arajs Kommando and, if so, whether his activities in that unit constituted participation in persecution. This issue had four sub-parts:

1) Concerning activities from July, 1941, through December, 1941 [the period of 73,000 killed]. The IJ held "... the evidence reflects that the [he] signed

his name to the rolls of the Arajs Kommando in July [1941] ... There is no evidence of participation or assistance beyond this act ... I find the government has failed to sustain its heavy burden of proof ..." The BIA reversed. 2) Concerning the period from January, 1942, to November, 1942. The Immigration Judge found ". . . [Kalejs] was a member of Arajs Kommando . . . on the eastern front from January through fall of 1942, . . . and that [Kalejs] assisted and participated in this persecution." The BIA reversed. (APP 324,5). 3) For the year 1943. The Immigration Judge ruled ". . . [Kalejs] was the Company Commander of a guard unit at a camp for Latvian Jews in Porkov, and that members of his company participated in the execution of 20-39 gypsies in Porkov . . . [Kalejs] assisted in persecution . . . in Porkov in 1943." The

BIA affirmed.

4) Dealing with [Kalejs'] alleged role as a Company Commander of the external guard unit at Salaspils and Sauriesi concentration camps. The Immigration Judge found ". . . [Kalejs] was a Company Commander under the Arajs Kommando and German SD of the armed exterior guard unit at Salaspils and Sauriesi . . . [Kalejs's] positions and activities at [these camps] constituted assistance and participation in persecution . . . ." The BIA affirmed.

The third major issue is whether Kalejs misrepresented his membership and activities in connection with the Arajs Kommando and, if so, whether such misrepresentation was material. The Immigration Judge found that ". . . [Kalejs'] failure to reveal his wartime activities when applying for his U.S. visa was a willful and material misrepresentation." The BIA affirmed.

The lack of congruity between the findings of the IJ and the BIA on the various issues is striking. They disagreed on all but the following: The BIA affirmed the IJ's ruling that Kalejs was the company commander of a guard unit for Latvian Jews at Porkov and "that members of his company participated in the execution of 20-39 gypsies in Porkov."[2] And the BIA affirmed the IJ's finding that Kalejs was the company commander of the exterior guard unit at Salaspils and Sauriesi concentration camps and that his "positions and activities" at [those camps] constituted assistance and participation in persecution.[3]

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[2] The sole evidence of concentration camp duty at Porkov and the killing of gypsies there was that of Soviet video tape witness Strazds. He testified Kalejs was not present at the execution carried out by Germans and gave no orders. (APP 327,9). Newly discovered evidence reveals Strazds post war association with the KGB.

[3] No document in evidence supports this finding. Its sole support is Soviet video tape depositions held inherently unreliable by Judge Manion and Judge Eisele (APP 32).

Finally, based upon the above findings, BIA affirmed the IJ's finding that Kalejs's failure to reveal his wartime activities in his visa application constituted a wilful and material misrepresentation.

ID. THE SEVENTH CIRCUIT'S FINDINGS

The Seventh Circuit affirmed with Judge Eisele providing a detailed dissent. The Seventh Circuit's opinion did not make findings on an issue by issue basis. The Majority stated: "The charges levelled against Kalejs undoubtedly qualify as assistance in persecution under the Holtzman Act," mentioned OSI documents and witnesses, indicated "[t]he immigration judge and the BIA did not believe Kalejs' denials and neither do we," found "the BIA was amply justified in concluding Kalejs assisted in persecution of people . . . within the meaning of the Holtzman Amendment," found he made a material misrepresentation, that the hearings "were con-

ducted with eminent fairness to Kalejs," and based the decision on the substantive test, "atrocities committed by a unit may be attributed to the individual based on his membership and seeming participation."

The concurring opinion of Judge Manion holds: "Although I agree with the dissent that 'evidence' generated under the watchful eye of the Soviet dictatorship is inherently unreliable and has no place in an American proceeding, I think the untainted evidence supports the Board's decision." He affirms on "the highly deferential standard by which we review Board deportation decisions." (APP 32,33).

The dissent of Judge Eisele states:

> ". . . [T]he Soviet authorities had a very good reason to implicate him [Kalejs] personally: they considered him a traitor for fighting with the Germans. (APP 77) . . . I am unaware how the Soviet evidence was 'corroborated by Western documentation plus reliable eyewitness testimony subject to vigorous cross-examination.' . . . The majority's statement that it will not discard a case against a Nazi collaborator mere-

> ly because some of the evidence originated in the Soviet Union assumes . . . [Kalejs'] guilt when that is precisely what is in issue. . . (APP 77,78). I do not believe that 'atrocities committed by a unit may be attributed to the individual based [solely] on his membership and seeming participation.'(APP 55). I . . . conclude that the deportation order can not be affirmed on this record." (APP 97).

II OSI EVIDENCE

The evidence against Kalejs is of several kinds: testimony of Dr. Raul Hilberg, an historian; documents from Germany; depositions of Soviet citizens taken inside of the former Soviet Union; and documents produced from Soviet archives.

IIA SOVIET DEPOSITION EVIDENCE IS INADMISSIBLE

Several of the depositions taken under Soviet control constituted the sole eyewitness identification testimony.

Each of the Soviet deposition witnesses had been imprisoned for years in Soviet gulags. At the depositions each was faced with a Latvian Soviet procurator who pre-

sided over the deposition and two of his assistant Latvian procurators, two procurators from the Central Soviet government, two OSI attorneys, a defense attorney, a translator and a video tape operator. Each OSI witness previously had been interrogated by the Latvian Soviet procurator who presided at the depositions. The protocols of these interrogations produced by the Soviets specifically for this case were nearly the only prior written witness statements the Soviet chose to reveal. Many written statements of OSI witnesses were taken relevant to this case in the 1940s and 1950s. The Soviet Union refused their production.

The Soviets forbade OSI and the defense: 1. to review the 1940s and 1950s witness statements; 2. to interview OSI witnesses prior to the actual taking of their deposition in the Soviet Union; 3. to travel inside of the Soviet Union to investigate;

4. to enter any Soviet archives to investigate and to obtain witness statements.

IIB "WESTERN" DOCUMENTS

Western documents produced include 1940s reports of the German SS of atrocities and the 1980 German court decision in the war crime case of People v. Arajs, District Court of Hamburg, 1980, Exhibit 22T. No "Western" document identified Kalejs with Arajs Kommando or its activities.

IIC LATVIAN DOCUMENTS

Kalejs had sought to enter the University of Riga in the fall of 1940. He could be admitted if he provided the University with proof he had aided and was aiding the anti-Soviet forces. Kalejs mentioned his problem to a former Latvian Army noncom who agreed to obtain documents for the University admission. These documents were produced by the Soviet Union and placed in evidence. They appear to be signed by Arajs and by others stating that

Kalejs was a member of Arajs Kommando. Kalejs was enrolled in the University based upon these documents.

IID TESTIMONY OF RAUL HILBERG

Hilberg was qualified as an expert on the history of the Holocaust. He reviewed the University documents. Hilberg testified of these Soviet documents:

> "The problem I have encountered with materials that come from the Soviet Union is . . . I do not see the entire folder from which the document is taken. What I am missing is a context, a before and after, which would make it possible for me to better understand the contents of the document." (V.3, 1090).

Hilberg also stated:

> ". . . whether I credit Soviet documents . . . I would have to look at it to the nth degree . . . I might probably come to the conclusion that these documents are not to be credited." (V.3 1096)

Notwithstanding, Hilberg opined based solely upon Soviet documents Kalejs was a member of Arajs Kommando.

Hilberg disagrees with high judicial standards of proof and, for himself, de-

termines "fact" as "what is most likely true" (v.3, 1056). No where does Hilberg testify that he concluded Kalejs was a member of Arajs Kommando within a reasonable degree of historical certainty.

Hilberg opined, based solely upon what OSI now claims to be a Soviet Abols statement -- that was not produced to Kalejs or the courts -- that Kalejs was the commander of the external guard at Salaspils and Sauriesi Concentration Camps. Both the IJ and the BIA said they disregarded Hilberg's testimony of Abols alleged statement since it was not produced and was not offered into evidence.

III NEWLY DISCOVERED EVIDENCE

After the close of the evidence in this case the Soviet Union dissolved. In 1993 Kalejs learned his researcher could enter the former Latvia SSR Soviet archives. Newly discovered materials were first presented to the Seventh Circuit by OSI in

the spring of 1993. At that time Kalejs asked the Seventh Circuit to continue oral argument to give him an opportunity to research in Latvia. This motion was denied. Kalejs continued with his efforts and filed exhibits with motions seeking a stay of the mandate with the Seventh Circuit, with the BIA to reopen, and finally accompanying an application to Justice Stevens.

This newly discovered evidence does not mention Kalejs in relationship to membership in Arajs Kommando. The historical texts name many men and officers of Arajs Kommando including the commander of the external guard at Salaspils and Sauriesi Concentration Camps. They do not name Kalejs. Several Soviet video tape witnesses recant or revise their testimony, several have died and one lives in Russia and is not available to Kalejs. 1940s and 1950s statements of the Soviet witnesses have been found. None mention Kalejs.

REASONS FOR GRANTING THE WRIT

Petitioner requests that certiorari be granted by this Court:

1) to exercise its power of supervision where the Seventh Circuit has so far departed from the accepted and usual course of judicial proceedings and sanctioned such a departure by the INS by admitting and placing substantial weight on "expert" testimony and Soviet procurator prepared witnesses' video tape depositions. Sup. Ct. R. 10.1(a);

2) to resolve an intercircuit conflict concerning the proper construction of the Holtzman Amendment: whether deportation under the statute requires proof of the alien's personal participation in atrocities or war crimes as the Sixth and Ninth Circuits have held, or, as the Seventh Circuit held: "atrocities committed by a unit may be attributed to the individual based [solely] on his membership and seem-

ing participation." Sup. Ct. R. 10.1(a).

I SOVIET EVIDENCE IS INHERENTLY UNRELIABLE

The Communist system of government was formed under Lenin. Lenin espoused a fundamental principle of the Soviet Union when he said:

> "To speak the truth is a petty bourgeois prejudice. To lie, on the other hand, is often justified by its ends."

The Secret Offensive, Chapman Pincher, Sidgwick & Jackson Ltd., London (1985) at page 24. See, Soviet Evidence in North American Courts, S. Paul Zumbakis of the Illinois Bar, Americans for Due Process, Chicago (1986), Chapter 6, pp 96-108. The Soviet "justice" system is not based upon the Anglo/American adversary principle; it is based upon the antithetical inquisitorial principle repudiated centuries ago with the abolition of Star Chamber.

It is established in our courts that the KGB (Soviet Secret Police) has resorted to

torture to obtain evidence, cheated and lied. See dissent, Kowalchuk v. United States, 773 F.2d 488, at 503,4,5 (1985) and authorities compiled there.

A former Soviet procurator who defected testified OSI cases were considered political-state security matters to them and the KGB was employed in these investigations. Matter of Maikovskis, Immigration Court, testimony of July 1, 1981. " . . .the KGB was responsible for preparing the . . . witnesses for OSI interrogation by examining them and obtaining written statements." United States v. Kungys, 571 F.Supp 1104 (D.N.J., 1983). The KGB as the Soviet secret police was charged as the Communist Party's enforcement agency. Kowalchuk, supra, at 503, f.n. 5. KGB formed a Latvian Committee for Cultural Relations of Latvians abroad with its objective to discredit Latvian emigres charging them with war crimes and collabo-

ration.[4] The "facts" were often embellished and supplemented with forged documents, false testimony and pure invention. Kowalchuk, supra, at 504,5.[5]

Two of the three judges in the Seventh Circuit panel acknowledged this unreliability: Judge Manion stated: " . . . I agree with the dissent [of Judge Eisele] that 'evidence' generated under the watch-

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[4] Kalejs was a graduate of the prewar Latvian Military Academy and a 1st Lt. in the Latvian Army. The Soviet's conquered and illegally incorporated independent Latvia into the Soviet Union in 1940. It involuntarily absorbed the Latvian military, including 1st Lt. Kalejs, into the Red Army. Kalejs testified he led the Latvian Ski Company in battle against the Soviet Union in 1942. Thus, to Soviet eyes Kalejs was guilty of high treason. Incidentally, the Seventh Circuit majority opinion's finding, "Again Kalejs sided with the victors; he deserted his Red Army comrades . . .(APP 5) " is a distortion of history. The Red Army had executed or deported most of the Latvian officer corp. They were not Kalejs' or Latvia's comrades.

[5] Soviet Union lies continued throughout its existence concerning World War II. This perfidy began no later that the Nuremberg Trial of the Major War Criminals, Proceedings Volume 7, p 425; Volume 9, p 3,4; Volume 17, p 274-545 where Soviets falsely blamed the Nazis for the massacre of thousands of Polish officers in the Katyn forest the Soviets had perpetrated and ended no sooner than its recent admissions that it held United States citizens as prisoners of war from World War II in spite of the fact we were then "allies." Kalejs trial took place during this "cold war."

ful eye of the Soviet dictatorship is inherently unreliable and has no place in an American proceeding . . . " (APP 33).

II SOVIET DEPOSITION EVIDENCE IS INADMISSIBLE

Additional objections to the Soviet deposition materials are: 1. Restrictions placed upon the defense prevented the defense from meaningful cross examination and from developing a defense; 2. Soviet restrictions placed on OSI prevented the prosecuting office of the United States from verifying the truthfulness of the Soviet witnesses for whom it must vouch.

Near the end of World War II, Soviet Red Army forces reoccupied Latvia. It captured witnesses to the German occupation. The Soviets interrogated them. The written statements, called protocols, then taken of the video tape Soviet witnesses and at their previous trials sought by the defense were withheld by the Soviets.

Some exist in the Latvian archives. [6] The statements produced for Kalejs' trial were recently orchestrated by the Soviets.

Remarkably, not even OSI was permitted to interview the witnesses prior to the taking of their depositions just as the defense was refused pretrial interviews. Free personal movement was restricted within the Soviet Union and neither the defense nor OSI could launch an independent investigation. Entry to the Soviet Archives was prohibited to OSI, its historian and the defense. The archives hold impeaching prior witness statements.

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[6] Each of the Soviet deposition witnesses testified at their depositions they had given written statements in the 1940s and 1950s to the Soviet authorities. The Soviet Procurator stated he would make no effort to produce these statements unless he were given the date of each statement and the agency of the Soviet Union involved and in no case would he produce any statements given to the KGB or in preparation for the deponent's or another person's trial. Following the dissolution of the Soviet Union, in 1993, Kalejs' researcher was able to enter Latvian Archives. Statements of several of the Soviet witnesses from the 1940s and 1950s have been discovered. These statements do not mention Kalejs' name and are exculpatory in nature.

Kalejs was released from INS custody after posting $750,000, 100% cash bond. The bond required he remain in the United States. The Soviet's would not inform the defense whether it would arrest Kalejs if he entered the Soviet Union. Kalejs was unable to attend the taking of the evidence and be present to aid his attorney.

The Soviet procurator informed the witnesses that they need not answer questions against their dignity, thereby frustrating cross-examination efforts of the defense to show interest, bias and susceptibility to intimidation.

These unwarranted restrictions substantially impaired the defense's right to cross examination. The restriction on OSI made it impossible for the United States to independently evaluate the Soviet Union's evidence it presented as its own -- it can not vouch for its own witnesses.

Amendment V to the Constitution requires

that "no person shall . . . be deprived of . . . liberty . . . without due process of law . . ." Congress and the Attorney General have attempted to provide procedural due process in deportation cases. 8 U.S.C. Sec. 1252(b) for Immigration Court proceedings provides:

> ". . . the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence on his own behalf, and to cross-examine witnesses presented by the Government. . ."

8 C.F.R. Sec. 242.16 (1988) provides:

> ". . . the respondent . . . will have a reasonable opportunity to examine and object to the evidence against him, to present evidence in his own behalf and to cross-examine witnesses presented by the Government. . ."

This case concerns facts of more than fifty years ago that took place in a country thousands of miles away. The examination took place without the presence of the defendant. Each witness had been personally prepared by Soviet agents and the only witness statements supplied were

of recent date prepared by the Soviets especially to support the Soviet's presentation of this case in the United States.

The potential for subtle intimidation is manifest where a witness faces five prosecutors from the office that sent each of them to the Siberian gulags for years. In order of maintain pressure on its witnesses the standard Soviet procedure was to refuse to bring Soviet witnesses to the United States. OSI represents to an American tribunal via its Soviet collaborators the witnesses are ill, however, witnesses are able to travel.[7]

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[7] It is evident from viewing the video tape depositions of the Soviet's witnesses, their health does not prevent travel to the United States to testify. Rozkalns complained of a sciatic nerve problem from his years in a Soviet penal mine (7068). Murnieks simply said he does not want to come to the United States (6314). Pimanis said no one asked if he would come to the United States and he does not want to (7158). "It is known to the Court that witnesses in the Soviet Union generally do not receive exit visas. This, however, is not openly discussed by the Soviets, but generally bears the remark that the witness can not travel due to poor health. When Mrs. MEDALJE did not respond to the summons to Hamburg, but did appear

(continued...)

No reasonable opportunity is afforded to cross-examine where the passage of fifty years excuses all memory failures, where each witness is prepared with an especially designed script by an occupying alien sovereign power imbued with the Star Chamber principle of the Inquisition. Without the witnesses prior statements of the 1940s and 1950s, opportunity for investigation and pretrial interviews the defense was not afforded a reasonable opportunity to cross-examine. The tribunals below and the Seventh Circuit failed to afford Kalejs this essential right.

There are eleven other United States cases involving use of OSI's Soviet deposition evidence. OSI admits the deposi-

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[7](...continued)
for the interrogation in Riga, it became clear that the medical reasons had only been contrived. This also applies for the witnesses LUTRINSCH and KALNINSCH who, though ready to travel, did not appear in Hamburg." Decision in the case of People v. Arajs, District Court of Hamburg, 1980, Exhibit 22T, (v.11, 3756).

tions were neither credited as principal nor as corroborative inculpatory evidence in three of those cases (7th Cir., R. Br., p 8). [8] None of the other eight cases used the Soviet depositions as principal inculpatory evidence. OSI has not taken issue with the assertion in previous Kalejs' Briefs that:

> "The previous Seventh Circuit cases decided favorably to OSI regarding 'participation in persecution' each had the required, official German military documents in evidence showing names, birth dates and military assignments that formed the basis of the persecution counts, with photographs of those defendants' attached -- most displayed defen-

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[8] Case 1. Matter of Laipenieks, A11 937 435, (Immigration Court, San Diego 1982), the judge indicated he did not give them any credit at all. "[W]e find tht (sic) the [Soviet] depositions do not meet the fundamental fairness test of Martin-Mendoza." See Martin-Mendoza v. INS, 499 F.2d 918, 921 (9th Cir 1974) and 8 C.F.R. 242.14(c).

Case 2. Matter of Maikovskis, A8 194 566 (Immigration Court, New York, 1983), "Such testimony cannot support the burden the Government must bear."

Case 3. United States v. Sprogis, No. CV-82-1804 (E.D.N.Y. 1984), "[I]t is unnecessary to resolve the issues raised by the defendant concerning the admissibility of any depositions taken behind the iron curtain." The circuit court elected not to rely on the Soviet depositions in any way. United States v. Sprogis, 763 F.2d 115 (2d Cir 1985).

dants' fingerprints."

No such documents were offered against Kalejs. The other eight cases, [9] gave

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[9] Case 1 United States v. Koziy, 540 F.Supp. 25 (S.D.Fla. 1982) depositions were also taken in Poland. The issue of inadmissibility of depositions was not raised and the court did not rely on them. Defense counsel did not participate in the Koziy Soviet depositions. 540 F. Supp. at p. 13, f.n. 14.

Case 2 United States v. Palciauskas, 559 F.Supp. 1294 (M.D. Fla. 1983), aff'd, 734 F.2d 625 (11th Cir. 1984), the "testimony of persons in a position to know and who claimed knowledge," included Soviet deponents and other witnesses. Moreover, the Soviet depositions played no role since the Court in its Finding 24 specifically declined to rule that Palciauskas participated in persecution. The 11th Circuit held as to the admissibility of the Soviet depositions: "any error that may have occurred was harmless" due to Palciauskas' admission that he was the Mayor of Kaunas in 1941-42 during the Nazi occupation. The Circuit Court ignored the Soviet depositions. 734 F.2d at 627. Defense counsel did not participate in the Soviet depositions.

Case 3 United States v. Hutyrczky, 803 F.Supp. 1001 (D.N.J. 1992), the depositions were taken in the United States! The defense made no objection to the use of these depositions, and the defendant's own affidavit admitted his Concentration Camp duty.

Case 4 United States v. Linnas, 527 F.Supp. 426 (E.D.N.Y. 1981), aff'd without opinion, 685 F.2d 427 (2d Cir 1982), the trial court gave no weight to the Soviet depositions (p. 434, f.n. 16). The admissibility of the Soviet depositions was not necessary to the decision since Linnas admitted concentration camp duty. Official German documents containing Linnas's signature as Camp Kommandant were properly in evidence. The defense did not participate in the Soviet depositions waiving the issue.

Case 5 United States v. Osidach, 513 F.Supp. 51 (E.D. Pa. 1981), "The Government at trial

(continued...)

Soviet evidence little to no weight. Witnesses from sources other than the Soviet Union claimed personal knowledge and identified the defendants in (Koziy, Palciauskas, Osidach, Kowalchuk); or defendants had admitted membership in (Linnas, Palciauskas); or the documentary evidence was "conclusive" in (Kairys) or depositions

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[9](...continued)
offered several live and videotaped eyewitnesses who each testified as to what they personally observed . . ." (p. 86, 513 F.Supp.).

Case 6 United States v. Kairys, 600 F.Supp. 1254 (N.D.Ill. 1984), aff'd, 782 F.2d 1374 (7th Cir 1986), Judge Moran noted the unfairness of the Soviet deposition evidence and refused to find participation in persecution which was the reason for their proffer. GX-32 was an identification card of Kairys with photo and thumbprint "demonstrates conclusively" Kairys' service at Treblinka concentration camps. 600 F.Supp. at 1261.

Case 7 United States v. Kowalchuk, 571 F.Supp. 72 (E.D.Pa. 1983), 773 F.2d 488 (3rd Cir 1985), three in court witnesses testified from personal knowledge. See page 74 of 571 F.Supp.. Kowalchuk was not found to have assisted in persecution. The Soviet deposition evidence failed to achieve its purpose. 773 F.2d at 491, f.n. 4.

Case 8 United States v. Kungys, 571 F.Supp. 1104 (N.D.N.J. 1983), 793 F.2d 516 (3d Cir 1986), the use of the Soviet depositions was severely restricted. They did not go to identification. "The . . . depositions will be admitted for the limited purpose of establishing the happening of the killings in . . . 1941." at p. 1132 of 571 F.Supp. The judge noted the restrictions on and fundamental unfairness of the Soviet depositions.

were limited to show killings occurred in (Kungys); or in the most recent case the depositions were taken in the United States in (Hutyrczky). Objection by the defense was not made in (Koziy, Hutyrczky); or the defendants did not participate in the Soviet depositions and objection was waived in (Koziy, Palciauskas, Linnas); or held to be at most harmless in (Palciauskas). The Seventh Circuit majority did not consider these cases. The dissent did. Judge Eisele stated: "I find myself in agreement with petitioner's [Kalejs'] analysis of these cases." Here the sole identification witnesses who claim personal knowledge of Kalejs alleged membership and duties were Soviet citizens. Their depositions were taken inside of and under the control of the Soviet Union. No German or Latvian military identification records were introduced relevant to alleged Arajs Kommando member-

ship -- no photo or thumbprint. Kalejs has consistently denied any service with the Arajs Kommando.

In United States v. Kowalchuk, 571 F. Supp. 72 (E.D. Pa. 1983), aff'd en banc, 773 F.2d 488 (3rd Cir. 1985), Judge Fullam commented on Soviet depositions:

> ". . . [F]alse or exaggerated accusations have often been employed by the Soviet government as a political weapon. Finally, considerations of basic fairness to the defendant militate against accepting the testimony of the government witnesses as clear and convincing proof of charges as serious as those leveled against this defendant." (571 F.Supp. at 77, 78, 79, 80, 81).

The present case contains substantially stronger reasons to reject the OSI, Soviet evidence. In Kowalchuk it was unknown that numerous prior written statements of the Soviet witnesses were not produced, that site and archive visit requests were denied. The inability of OSI to vouch for its witnesses was unknown. Mr. Kowalchuk, a United States citizen, was not required

by a bond to remain within the United States. Since the Kowalchuk decision reprehensible Soviet conduct has been exposed inside United States Courts as has been fraud of OSI attorneys against its targets. See Demjanjuk v. Petrovsky, 10 F.3d 338, 1993 U.S. App. LEXIS 29694 (6th Cir. 1993).[10] The only eyewitness testimony against Kalejs as to identity, membership and activities are the Soviet controlled depositions untested by the defense and untested by OSI. The admission of the Soviet deposition evidence under these circumstances is a violation of the fundamental right to due process undermining the integrity of the fact finding process. Compare, Martin-Mendoza v. INS, 499 F.2d 918, 921 (9th Cir 1974) and 8

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[10] In Israel five alleged eyewitnesses wrongly identified Demjanjuk as "Ivan the Terrible" who ran the gas chamber at Treblinka resulting in his sentence to death. Fifty year old eyewitness testimony is not reliable. It is worse yet when supplied by the Soviet Union.

C.F.R. 242.14(c).

The Seventh Circuit relied upon the video tape Soviet witnesses deposition identification. It stated:

> "Several of these witnesses identified Kalejs as the man they knew from an array of 250 photographs, a stunning indictment given the fifty years that have passed since any of these people had seen the accused." (APP 18).

That court fails to appreciate that each of the identification witnesses (all Soviets) testified they had more recently been shown photographs of Kalejs in a Soviet prepared and Soviet conducted photospread. The photospreads displayed eight photographs of six different men -- two photographs of Kalejs were included (App 298). Just prior to again showing Soms this same photospread at his video tape deposition a fifteen minute break was taken (RR 5399). Immediately following the break, Soms was shown the Soviet photographs he had previously marked in the sole presence of the

Soviets (RR 5401). Then Kalejs' attorney showed Soms the array of 250 photographs. Soms reviewed these photographs and the Soviet's took another break (RR 5423). After this break Soms compared the Soviet obtained photos to the defense group (RR 5423-5). This is not "a stunning indictment given the fifty years that have passed . . .," nor a test of memory of years ago, but rather a test of whether after viewing a person's photograph Soms could recognize a photo of that person a few minutes later.[11] What did the Soviets say to the identification witnesses during these breaks? Similarly the other Soviet witnesses were shown the photospreads they had previously viewed shortly before viewing the new photospread.

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[11] Soms who recently provided an affidavit stated he testified he knew Kalejs: "I feared being put back into [prison] camp." Soms there also states he knew nothing of Kalejs' war time activities and he was not ill at the time of the depositions and could have traveled here to testify.

Judge Eisele, dissenting stated:

> "And, in no event can it be said that he had a 'reasonable opportunity to cross examine witnesses presented by the government,' considering the same limitations on discovery (including denial of pre-deposition access to the witnesses and to their prior statements) and the locus and circumstances of the taking of the depositions, including the role of the Soviet procurator in restricting cross-examination. If the regulation does not require this conclusion, surely the Constitution does." (APP 35)

The Seventh Circuit stands alone in accepting Soviet depositions evidence as dispositive. The inherently unreliable Soviet evidence should be stricken. This Court should elect to exercise its supervisory power to insure inherent integrity of the fact finding process below.

III KALEJS WAS PREVENTED FROM PRESENTING A DEFENSE

The Soviet Union prevented Kalejs from travel needed to investigate, prevented him from entering the Soviet held archives to obtain exculpatory documentary evidence and witness leads. The result of these

restrictions prevented the defense from preparing a defense of any kind.

In Washington v. Texas, 388 U.S. 14, 87 S. Ct. 1920, 18 L.Ed.2d 1019 (1967), the Court stated:

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law. Id. at 19, 87 S.Ct. at 1923."

The Washington case was a criminal case. But it is applicable here[12]. It is universally accepted United States civil practice that a litigant has the right to prior witnesses statements for impeach-

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[12] See also, ". . . the evidence used to prove the government's case must be disclosed . . . so that he has an opportunity to show that it is untrue." Green v. McElroy, 360 U.S. 474, 496 (1959); Applicable to administrative hearings: Morgan v. United States, 304 U.S. 1, 18-19 (1938).

ment, to be present to aid his attorney at the taking of the evidence against him, to investigate the facts of the case, to interview witnesses, to visit archives holding records used against him or to visit the sites involved in a civil case. Every litigant in any court or administrative tribunal in the jurisdiction of the United States has the right to prepare a meaningful defense and to meaningful cross examination. Deportation from the protection of the laws of the United States may result in prosecution in a foreign country. The gravity of deportation cases impelled the Supreme Court in Woodby v. INS, 385 U.S. 276, 17 L.Ed.2d 362 (1966) to require the government to prove its case by clear, convincing and unequivocal evidence. A standard of proof substantially identical with that required in criminal cases. Klapprott v. United States, 335 U.S. 601 at 612 (1949). See,

United States v. Riela, 337 F.2d 986, 988 (3d Cir.1964). The defense did not have a fair opportunity to be heard, to prepare and present a meaningful defense. The Soviet Union, alone, decided what documents to provide and what witnesses it would supply. It also decided what documents and witnesses not to disclose. [13] OSI acquiesced in these Soviet procedures.

IV "WESTERN" EVIDENCE IS INSUFFICIENT

The Western evidence upon which the majority relies is almost non-existent. As the dissent pointed out: "I am unaware how the Soviet evidence was 'corroborated by Western documentation plus reliable eyewitness testimony subject to vigorous

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[13] "When [the respondent] attempted to prepare a defense, he found the Soviet fox to be the keeper of the chicken house. . . . [The] contention, therefore goes far beyond an argument that he was denied the opportunity to interview potential witnesses. Rather, it is that he was denied the opportunity to develop a meaningful defense of any type." Kowalchuk v. United States, 773 F.2d 488, 501, (1985) in the dissenting opinion of Chief Judge Aldisert.

cross-examination.'" (APP 77,78). The sole eyewitness identification testimony was admitted via video tape depositions taken in the Soviet Union under the watchful eye of the Soviet Procurator.

The sole Western documentation consists of World War II orders and reports, and a postwar judgment against Arajs, himself, all from Germany none mentioning Kalejs.

Dr. Hilberg has testified in many cases on behalf of OSI.[14] He described background events: On June 17, 1940 the Soviet Union invaded Latvia and incorporated it into the Soviet Union (v.11, 3644); on June 22, 1941 Germany attacked the Soviets and pushed them out of the Baltic States (v.3, 836). He discussed his views of Nazi persecution and the role of the Arajs Kommando (v.3, 836-1050). He was quali-

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[14] Hilberg has testified for OSI in seven denaturalization cases and in two other deportation cases (v.3, 835).

fied as an expert on the history of the Holocaust. But, he testified as though he were an expert on membership in Arajs Kommando thereby invading the provence of the finder of fact.[15]

Hilberg based his opinion that Kalejs was a member of Arajs Kommando in part on alleged "testimony" of one Abols. This Abols "testimony" was the sole evidence he relied upon for Salaspils and Sauriesi Concentration Camp duty (1077). It was not credited by either the Immigration Judge nor the Board of Immigration appeals.[16]

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[15] Hilberg's book, The Destruction of the European Jews, does not mention Kalejs, nor does it mention Arajs nor the Arajs Kommando. Hilberg acknowledged that Soviet authorities tightly control all access to all documents concerning World War II war crimes. Kowalchuk v. United States, 773 F.2d at 504. Hilberg had never been permitted to visit a Soviet archives (v.3,1059). He does not read Latvian.

[16] Abols statement, if it exists or existed, was not offered in evidence, nor produced. Abols died in 1963 (v.19, 7209). The Arajs case was tried in the court session of 21 December 1979 and decision rendered 27 October 1980 (v.11, p.3634). (continued...)

At trial Hilberg was shown several Latvian Soviet documents, the "University documents," Kalejs had obtained to enter the University. They falsely state Kalejs was a member of Arajs Kommando.[17] These documents are not compelling even by Hilberg standards. Hilberg's most direct criticism of the Soviet supplied University documents was:

> "The problem I have encountered with materials that come from the Soviet Union is . . . I do not see the entire folder from which the document is taken. What I am missing is a context, a before

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[16](...continued)
Abols was long dead. His "actual statement" would be hearsay. Hilberg's testimony of the alleged substance of "Abols testimony" without its production constitutes hearsay on hearsay and is not admissible. Contradicting OSI's position, Arajs' trial attorney, Bürger, testified that Kalejs' name was not mentioned in the testimony or exhibits of Arajs' trial (v.5, 1778).

[17] Prior to his death Arajs executed an affidavit while viewing some of these exhibits stating that Arajs Kommando provided such false documents to aid fellow Latvians and that he, himself, had signed several. (v.20, 7565). Soviet witness Jansons filed such a certificate with the University when he left Arajs Kommando in December, 1941 (v.18, 6853,6875,6). Members of Arajs Kommando did not attend the University according to Soms (5395) and Kalnins (6128).

> and after, which would make it possible for me to better understand the contents of the document." (V.3, 1090).

Without the full context such documents are subject to misinterpretation just as the blind man who touches only the tail of an elephant, perceives an elephant as very like a snake.

In another context Hilberg states:

> ". . . whether I credit Soviet documents . . . I would have to look at it to the nth degree . . . I might probably come to the conclusion that these documents are not to be credited." (V.3 1096)

It is not just the discredited University documents upon which Hilberg relies for his opinion that Kalejs was a member of Arajs Kommando. Hilberg claims he has seen other more compelling documents (v.3, 1063) that he does not describe which were not produced and were not offered into evidence. Hilberg admits, "the central situation including the status of Mr. Kalejs [membership and activities] was

based on documents that weren't introduced" (1063). The only specific document Hilberg referred to that was not introduced was the so-called Abols "testimony," discredited below, that Hilberg claims says Kalejs was the commander of the external guard at Salaspils -- an Arajs Kommando guarded camp. Hilberg opined, based solely upon the discredited alleged Abols testimony, Kalejs was the commander of the Salaspils external guard. [18]

So there exists no Western document and no Western testimony of alleged membership or deeds except that of Hilberg the most frequent OSI witness in these cases.

Hilberg in arriving at his determination of historical "fact" neither requires clear and convincing evidence, nor evidence beyond a reasonable doubt. He crit-

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[18] OSI now claims the Abols statement exists as a Soviet document -- not a Western document. If so, the Soviets have kept it all to themselves.

icizes the judicial burden of proof as too high a burden and Hilberg, himself, determines "fact" as "what is most likely true" (v.3, 1056). No where does Hilberg testify that he concluded Kalejs was a member of Arajs Kommando within a reasonable degree of historical certainty.

Hilberg did not claim to have any personal knowledge of Kalejs, nor did he claim Kalejs was identified in an historical treatise. The hearing judge and the BIA discredited as unacceptable the Abols "testimony" Hilberg relied upon. That ruling was made after Hilberg's testimony. We do not know what Hilberg's opinion would be without giving weight to Abols.

The threshold question is whether or not Kalejs was a member of the so-called Arajs Kommando. It is OSI's claim of such membership that forms the nexus of their case. Without establishing the membership nexus by clear and convincing evidence,

OSI's case failed.

V NEWLY DISCOVERED EVIDENCE

The Petitioner faces a unique situation. OSI took aim at Kalejs by 1984. The IJ ordered deportation in 1988. The BIA entered a final order of deportation in 1992. Before trial OSI had limited access to Soviet selected sources -- Kalejs none.

After the decisions the Soviet Union unexpectedly dissolved. An investigator for the defense could travel and investigate in Latvia but not yet the now Latvian Archives. A notary took statements of several Soviet deposition witnesses. In the Spring of 1993 Kalejs first learned he could enter those Archives. A researcher entered and discovered several Soviet video tape witnesses' 1940s and 1950s statements. Kalejs sought and obtained Latvian history books concerning Nazi and Arajs Kommando conduct in Latvia.

This newly discovered evidence is not

before this Court as part of the record of the immigration hearings concluded in 1988 nor the BIA's 1992 decision on the trial record. It is in the record as exhibits to a Motion for Stay to the Seventh Circuit and as exhibits to an Application for Stay to Justice Stevens. These documents will be referred to as StEX #. Few of the documents are translated from Latvian or Russian and few certified by the Archives due to various constraints.[19]

Essentially the same material was presented to BIA on a motion to reopen. BIA has not ruled and may not be expected to

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[19] However, "free" Latvia may be, the majority of government offices, from the President down to the procurators, are presently held by the former Soviet functionaries. The Archives will not provide a copy machine -- it may not have one. Assistance by the staff is less than enthusiastic. To this point proper certified copies have not been obtained. On January 20, 1994 for the first time Kalejs was informed that his requests for properly certified copies of archive documents would not be approved without the receipt of a written request by Procurator Zakis of the Latvian Republic from his American lawyer. Months may pass prior to the delivery of any certified documents from the archives -- maybe never without judicial assistance.

rule for a substantial period of time. BIA required three years to affirm the IJ. In an effort to completely foreclose all forums to the defense OSI argued to BIA:

> "Respondent's motion in the 7th Circuit to continue oral argument based on these protocols (Jansons', supplied by OSI) and the arguments presented here was rejected by the 7th Circuit. Likewise, the Board should reject these arguments."

If BIA accepts this OSI argument, Kalejs' motion to reopen will be summarily denied. If not, BIA may not decide the Motion to Reopen for several years and then only if Kalejs is imprisoned. Kalejs is 80 years of age suffering from cancer.

From the archives came summaries of statements from the 1940s of Ennitis, a video tape witness; Jansons, a video tape witness; Sgt. Detlavs and Gailis (StEx B, p. 50) who were each identified as members of Arajs Kommando in the newly discovered historical Soviet texts. None of these witnesses mentioned Kalejs' name, includ-

ing Ennitis whose video tape testimony named Kalejs as his commanding officer at Salaspils and Sauriesi Concentration Camps upon which the Seventh Circuit relied. A new statement of video tape witness Strazds informs us he became a KGB agent after the war. (StEx B, p. 55).

New University records provide a bit of the context Hilberg acknowledged was missing for the "University" records introduced. They showed Kalejs' matriculation from December 18, 1941 to March 1, 1942 and from November 5, 1942 to September 30, 1943 (StEx B, p. 59) each corroborating Kalejs' testimony and arguably providing a semblance of an alias defense to concentration camp service at Porkov with the gypsy incident and partial as to Salaspils and Sauriesi alleged service.

Soms' new affidavit (StEx E, p. 77) states he identified Kalejs only because he feared being put back into [prison]

camp and that he knows nothing of Kalejs' war time activities. An additional affidavit from video tape witness Primanis (Pimanis) (StEx E, p. 80) upon whom the Seventh Circuit had relied now states he did not know Kalejs at Salaspils and that 1st Lt. Tone was the exterior guard commander. A marked difference from his video tape testimony that Kalejs was the exterior guard commander at Salaspils.

Based on Hilberg's testimony the Seventh Circuit held:

> "As a company commander, Kalejs was one of six or seven officers who were second in command to Arajs; he had a hundred men or more under his direction." App 7.

Hilberg had identified on OSI prepared Exhibit 19 (v.9, 3197) company commanders of the Arajs Kommando (v.3, 842) -- (1) Cukurs, (2) Kalejs, (3) Kalnins, (4) Laukers, (5) Ozols, (6) Svikeris (v.9, 3197). This is merely lawyer created demonstrative evidence -- not evidence of the mat-

ter asserted therein. Hilberg obtained all the names, **except** Kalejs', from the decision in the case of People v. Arajs, District Court of Hamburg, 1980, Exhibit 22T, (v.11,3634). It names the others.[20]

Kalejs was able to obtain copies of historical books published in Latvia under the Soviet regime.[21] These books are: "KAS IR DAUGAVAS VANAGI": "FALCONS OF DAUGAVAS", Riga 1962 (StEx F, p. 88); "SALASPILS NAVES NOMETNE": "SALASPILS DEATH CAMP", Riga 1973 (StEx F, p. 169); "POLITISKIE BEGLI BEZ MASKAS": "POLITICAL REFUGEES UNMASKED", Riga 1963 (StEx F, p. 480); "NO SS UN SD LIDZ . . .": "FROM SS & SD TO . . .", Riga 1979 (StEx F, p. 691);

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[20] Arajs who died prior to the time the defense offered evidence provided an affidavit where, under oath, Arajs stated: ". . . I also declare under oath that there never was a . . . First Lieutenant Konrads Kalejs, . . . serving under me in the [Arajs Kommando]" (v.20, 7565).

[21] Books produced in Latvia during the illegal Soviet occupation were published only by the Soviet authorities. There was no "free press."

"VAINIGIE UN NELAIMIGIE": "THE GUILTY AND THE UNFORTUNATE", Riga 1989 (St Ex F, p. 780). These books name officers and men of the Arajs Kommando and others involved with the Nazis. They do not name Kalejs and they do not name Abols.[22]

"SALASPILS NAVES NOMETNE", names 1st Lt. Tone as commander of the external guard at Salaspils and Sauriesi, not Kalejs. Eliminating Tone as concentration camp commander and Ozols as adjutant, all seven company commanders of Arajs Kommando are accounted for without Hilberg's arbitrary inclusion of Kalejs: (1) Cukurs, (2) Kalnins, (3) Laukers, (4) Svikeris, (5)

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[22] Some named as members of Arajs Kommando are Major V. Arajs; 1st Lt. Ozols; 1st Lt. Perro; Captain Cukurs; Captain Kalinovskis; Captain Rubenis; Janis Platais; P. Murnieks; Lt. A. Strauchs; Sgt. K. Detlavs; Lt. A. Trucis; A. Petrovskis; Lt. Sipols; H. Krums; K. Rozkalns; T. Abolins; H. Klingeris; J. Likais; K. Strazds; A. Bajars; Lt. Viduss; and Kaufmanis, Jurksaitis, Andermanis as 1st Lt. Tone's men; and Sgt. Dzenis as a camp official; and Freimanis, Gailis, Sgt. Cmutovs, O. Berzins and Sulainis as Salaspils guards.

Kalinovskis, (6) Rubenis and (7) Perro. There was no company commander position remaining that Kalejs' could have filled.

Had Kalejs been a company commander of one of the six or seven companies of the Arajs Kommando, the commander of the external guard of Salaspils Concentration Camp and active in killing thousands of Jews, as OSI alleges, he was highly visible. The failure of so much as the mention of the name Kalejs in any of the 1940s and 1950s protocols or the historical texts points to his innocence.

Therefore, we ask this Court for leave to adduce new evidence before it, in the alternative, pursuant to 28 U.S.C. Sec. 2347 to remand for a new trial to adduce new evidence in hand, and to be obtained.

VI LACK OF DISCOVERY AND BRADY ERROR

Kalejs had requested discovery and specifically requested exculpatory evidence pursuant to Brady v. Maryland, 373 U.S. 83

(1963). OSI objected to both requests maintaining no statute required either general discovery in a deportation case and that the principle of Brady does not apply to its prosecution of deportation matters. The Immigration Judge ordered limited production and refused to enter an order requiring production of evidence favorable to the defense. None of the newly discovered documents were available for the hearing.

Judge Eisele in the dissent states:

> The statutes and regulation [8 U.S.C. Sec. 1252(b) and 8 C.F.R. Sec. 242.16] mandate that the alien "have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf and to cross-examine witnesses presented by the Government." Did Mr. Kalejs have such "reasonable opportunity" here? One could, by interpreting the language quoted from the regulation expansively, argue that it simply incorporates Brady v.Maryland, Washington v. Texas, and the evidentiary rules governing cross-examination. But even if one interprets the language narrowly and concludes that Mr. Kalejs had a reasonable opportunity to examine the evidence that the government actually chose to use against him, it can be

> questioned whether he had a "reasonable opportunity to present evidence on his own behalf," considering the restrictions placed on him in relation to discovery. And, in no event can it be said that he had a "reasonable opportunity to cross-examine witnesses presented by the government," considering the same limitations on discovery (including denial of pre-deposition access to the witnesses and to their prior statements) and the locus and circumstances of the taking of the depositions, including the role of the Soviet procurator in restricting cross-examination. If the regulation does not require this conclusion, surely the Constitution does. (APP 80,81).

The Supreme Court in Brady held: "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87.

OSI refused a Brady production answer.

OSI did not produce the book "SALASPILS NAVES NOMETNE": "SALASPILS DEATH CAMP", Riga 1973, page 109 of which OSI placed into evidence (V.20 7735). The defense

obtained this book after the BIA decision which is now shown to be exculpatory. It states 1st Lt. Tone was the commander of the exterior guard at Salaspils and Sauriesi, not Kalejs. It was in OSI's possession before trial in 1987 (V.20 7735).[23]

In Demjanjuk v. Petrovsky, 10 F.3d 338, 1993 U.S. App. Lexis 29694 (6th Cir. 1993), the court held:

> "We believe Brady should be extended to cover denaturalization and extradition cases where the government seeks denaturalization or extradition based on proof of alleged criminal activities of the party proceeded against."

Here OSI made every effort to brand Kalejs a mass murderer intimately involved in the murder of 73,000 Jews.

In Demjanjuk, the former Director of

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[23] OSI points out that Kalejs' attorney argued to the BIA that this book does not mention Kalejs, however, he did not have possession of the book. If he had these Soviet Latvian books, he would have offered them for the defense as OSI offered Hilberg's book. This and the other books would have been used to confront Hilberg. Had Hilberg been made aware of this historical information Hilberg may have withdrawn this opinion that he believed Kalejs was a member of Arajs Kommando.

OSI, Ryan, testified it is "fundamentally unfair" not to follow the Brady principle in OSI cases. Ryan testified he intended his office make full disclosure of exculpatory material. The OSI director's interpretation of required fundamental fairness in all OSI cases is persuasive.[24] This Court should exercise its power to insure lower courts provide fair hearings.

VII. THE SEVENTH CIRCUIT'S CONSTRUCTION OF THE HOLTZMAN AMENDMENT CONFLICTS WITH THOSE OF THE SIXTH AND NINTH CIRCUITS

The Seventh Circuit failed to make explicit findings on each contested issue. Rather, it approved deportation under the Holtzman Amendment for "seeming participation" in direct conflict with the decisions of the Sixth Circuit in Petkiewytsch

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[24] It was for withholding exculpatory information from Demjanjuk's defense resulting in his death sentence that OSI attorneys were found to have engaged in fraud by the Sixth Circuit. OSI has filed a petition for rehearing *en banc*. It can reasonably be expected that the Court will be asked to review the Demjanjuk case which involves vital similar issues.

v. INS, 945 F.2d 871 (6th Cir. 1991) and the Ninth Circuit in Laipenieks[25] v. INS, 750 F.2d 1427 (9th Cir. 1985). Is Kalejs' liberty to remain in the U.S. after 35 years to be based on the fact his home is Chicago, not Cleveland or Los Angeles?

Laipenieks had served with the Latvian Political Police, the S.D., organization that collaborated with the Nazis to apprehend communists and other Soviet sympathizers. 750 F.2d at 1429. The BIA had found him deportable under the Holtzman Amendment. Id. The Ninth Circuit reversed. The court analyzed the Holtzman Amendment, including its relationship to the Displaced Persons Act of 1948 (the "DPA"). Id. at 1430. Most "helpful" in interpreting the DPA, was the Court's

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[25] The newly discovered Latvian Book, "Falcons of Daugavas," names not only Arajs members, but German collaborators who were not Arajs members. e.g., Edgar Laipenieks (S.D. Man: See Laipenieks, supra). It does not mention Kalejs.

decision in Fedorenko v. United States, 449 U.S. 490 (1981). The Ninth Circuit quoted the Court's footnote 34 at 512-13 n. 34, the Ninth Circuit wrote:

> "Fedorenko stated that the proper analysis under the statute was whether the acts of the individual amount to assisting in the persecution of civilians." 750 F.2d at 1431 (emphasis added).

The Laipenieks court found "the language and intent" of the Holtzman Amendment "requires that deportability may only be sustained when the evidence established that the individual in question personally ordered, incited, assisted or otherwise participated in the persecution of individuals." Id. (emphasis added). The Ninth Circuit's interpretation was "mandated first by the plain language" of the Holtzman Amendment and by its legislative history: Representative Holtzman's statement that "[t]he bill is intended to cover active participation and not mere acquiescence by the population as a whole," in

support of its view that "active personal involvement in persecutorial acts needs to be demonstrated." Id., 124 Cong. Rec. 31649 (1978).

The Ninth Circuit concluded, guided by Fedorenko and legislative intent, Holtzman Amendment deportation requires:

> "that the government provide proof of personal active assistance or participation in persecutorial acts . . ." Id. at 1432.

The Seventh Circuit next construed the Holtzman Amendment in Schellong v. INS, 805 F.2d 655 (7th Cir. 1986). [26] The Seventh Circuit simply noted that, in an earlier denaturalization case, United States v. Kairys, 783 F.2d 1374, 1377 n. 3 (7th Cir. 1986), it had held that "service as a Nazi camp guard equaled persecution .

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[26] The Seventh Circuit failed to consult legislative history. The Sixth and Ninth Circuits, by contrast, did. Petkiewytsch, 945 F.2d at 877-90; Laipenieks, 750 F.2d at 1430-32. In addition, the Seventh Circuit overlooked the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987).

. . without proof of personal involvement in atrocities." (805 F.2d at 660) and that the Holtzman Amendment required no proof of personal participation in atrocities.

In response to Schellong's citation of Laipenieks and United States v. Sprogis,[27] 763 F.2d 115 (2d Cir. 1985) (a denaturalization case), the Seventh Circuit stated that "insofar as these cases hold that personal involvement in atrocities is necessary to have assisted in persecution for purposes of the DPA or the Holtzman Amendment, they conflict with Fedorenko, 449 U.S. at 512 n. 34." 805 F.2d at 660.

The Sixth Circuit in Petkiewytsch v. INS, 945 F.2d 871 (6th Cir. 1991) noted that, in Schellong, the Seventh Circuit had "specifically rejected the argument that an individual must have actively

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[27] "Falcons of Daugavas" also names Sporgis (police in Modona): See United States v. Sporgis, 763 F.2d 115 (2nd Cir.1985).

participated in persecution to be deportable under the Holtzman Amendment," and that Schellong's holding was reaffirmed in Kulle. . . ." Id., 945 F.2d at 878.

The Sixth Circuit then confirmed the conflict between the Seventh Circuit's rulings and the Ninth Circuit's, noting that "[a]nother court reached a different conclusion in Laipenieks . . . ." Id.

To the Sixth Circuit, particularly probative of Congress's intent was Representative Holtzman's reference to "war criminals" nineteen times on the House floor as the purpose of the bill she sponsored, her representation the bill was directed "solely to those persons who engaged in war crimes." Petkiewytsch, 945 F.2d, 879.

> "If, as the Supreme Court stated, the focus under the DPA should be on the 'particular conduct' of the immigrant, then given the legislative history of the Holtzman Amendment, that focus should be even more searching under [the Amendment]." Id. 945 F.2d at 880.

The Sixth Circuit held for Petkiewytsch.

OSI did not seek review of these adverse judgments in this Court, allowing the conflict to stand.

Because of the need for a clear and uniform legal standard to govern the proceedings, a definitive interpretation of the Holtzman Amendment by this Court is warranted. In the past, the Court has granted certiorari, even in the absence of circuit conflicts, to resolve questions relating to the proper administration of the immigration and naturalization laws. Cf. United States v. Menasche, 348 U.S. 528, 531 (1955); Baumgartner v. United States, 322 U.S. 665, 666 (1944); United States v. Ness, 245 U.S. 319, 321 (1917) (certiorari merited when the question posed is important to uniform administration of naturalization laws).

Petitioner submits that here, as well, the need for a clear and uniform rule on important questions relating to both sub-

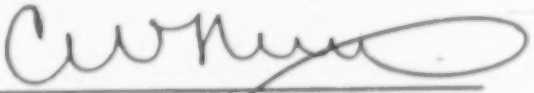
stantive administration of the immigration laws and vital procedural and evidentiary standards calls for this Court's review.

CONCLUSION

For the foregoing reasons, petitioner, Konrads Kalejs, respectfully requests that a writ of certiorari issue to review the judgment of the court of appeals.

Dated: January 31, 1994

Respectfully submitted,



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Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

KONRADS KALEJS,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Dated: January 31, 1994

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

TABLE OF CONTENTS OF APPENDIX

Description:	Page Herein
Opinion of the Court of Appeals for the Seventh Circuit (November 17, 1993	APP 1
Decision of the Immigration court ordering deportation (November 1, 1988)	APP 102
Opinion and Order of the Board of Immigration Appeals affirming (April 30, 1992)	APP 193
Judgment of the Court of Appeals (November 17, 1993)	APP 394
Order of the Court of Appeals denying rehearing (December 30, 1993)	APP 396
Order of the Court of Appeals granting stay (January 10, 1992)	APP 398
Statutes Cited	APP 400

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 92-2198

KONRADS KALEJS,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review from the
Board of Immigration Appeals of the
Immigration and Naturalization Service.

No. A11 655 361

Argued April 30, 1993 -- Decided November 17, 1993

Before CUMMINGS and MANION, *Circuit Judges*, and EISELE, *Senior District*

*Judge.**

CUMMINGS, *Circuit Judge*. The government seeks to deport eighty-year-old Konrads Kalejs, an alleged Nazi collaborator who has now lived in the United States for thirty-four years. After Germany's defeat, Kalejs fled to Australia. He came to the United States in 1959 claiming to have been a farm laborer during the war. Whatever his real occupation then, Kalejs has been a financial success in the United States: he owns four homes, had assets in excess of a million dollars in the mid-1980s, and was able to post a $750,000 bond to secure his freedom while this case was pending. The Justice Department first set its sights on Kalejs in late 1984. But when he was about to be nabbed, he

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* The Honorable Garnett Thomas Eisele, Senior District Judge of the Eastern District of Arkansas, is sitting by designation.

took $350,000 in cash and fled to Canada and Australia. When Kalejs returned to the United States, he tried to assume a new identity and managed to elude capture for six months. He was finally arrested in Florida on April 19, 1985; government agents expended 1,500 hours in the search. In the more than eight years since his arrest, Kalejs has bitterly disputed the charges that he was an officer in a pro-Nazi unit that killed tens of thousands of people, and that he assisted in other persecutions as an army officer, policeman and concentration camp guard.

Both an immigration judge and the Board of Immigration Appeals("BIA")--sitting in Chicago after Kalejs was granted a change of venue--considered the case in extraordinary detail, found Kalejs' denials unconvincing, and held that he should be

deported under 8 U.S.C. §§ 1251(a)(1)(A), 1251(a)(1)(B) and 1251(a)(4)(D).[1] If he is deported, Kalejs will return to Australia where he retains citizenship. We have jurisdiction to hear direct appeals of BIA decisions under 8 U.S.C. § 1105a(a). Kalejs presses upon us essentially three arguments: that he did not commit war crimes, that he did not lie on his visa application to enter the United States (or rather, that the lies he told were immaterial), and that prosecutors relied on inherently untrustworthy evid-

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[1] The sections were previously numbered as 8 U.S.C. §§ 1251(a)(1), (2) and(19).

8 U.S.C. § 1251(a)(1)(A) provides:

Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens excludable by the law existing at such time is deportable.

8 U.S.C. § 1251(a)(1)(B) provides:

Any alien who entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this chapter or any other law of the United States is deportable.

8 U.S.C. § 1251(a)(4)(D) provides:

Any alien described in clause (i) or (ii) of section 1182(a)(3)(E) of this title is deportable. See *infra* for the text of 8 U.S.C. § 1182(a)(3)(E).

ence -- depositions and documents salvaged from the archives of the former Soviet Union -- and then compounded the error by denying him due process. We affirm the BIA's decision in all respects.

Konrads Kalejs was born on June 26, 1913, in Riga, Latvia. He was educated as a professional soldier and served as a lieutenant and first lieutenant in the Latvian military. In 1940, the Russians overran Latvia. Kalejs salvaged his military career by joining the conquering Red Army, but a year later the Russians were themselves pushed out of Latvia by the Nazis, whose forces were driving relentlessly toward Russia on the eastern front. Again Kalejs sided with the victors; he deserted his Red Army comrades and, according to the evidence presented here, joined a pro-German force called the Lat-

vian Auxiliary Security Police. The unit was also known as the Arajs Kommando after its leader Viktors Arajs, who was convicted by a German court and sentenced to life imprisonment in 1979 for committing wartime atrocities. (Arajs died in prison) According to the Justice Department, from July 1941 until at least June or July of 1944, Kalejs was a company commander and first lieutenant in the Arajs Kommando.

The Nazis' policy in Latvia (as elsewhere) was to murder all Jews, Gypsies and many Communists. After the German army swept through an area, a mobile killing crew would follow shortly, hoping to catch victims unaware. These mobile killing units were called the Einsatzgruppe or, in Latvia, the Einsatzkommando. According to the government's expert witness in the case against Kalejs, Dr. Raul Hilberg, a

renowned Holocaust scholar and professor of political science at the University of Vermont, the Einsatzkommando assigned to Latvia had just 170 members. The logistics of attempting the systematic annihilation of the 70,000 Jews in Latvia prompted the Einsatzkommando to rely on bands of local soldiers. The Arajs Kommando was such a group. As a company commander, Kalejs was one of six or seven officers who were second in command to Arajs; he had a hundred men or more under his direction.

Dr. Hilberg testified that according to German documents, the Einsatzkommando with the help of the Arajs Kommando and similar local groups managed to murder 29,000 people (90 percent of them Jewish) before August 10, 1941. A few months later, in order to make room in Riga's Jewish ghetto for the thousands of Jews whom Hitler had

shipped out of Germany, 27,800 Jews were shot in the woods near Riga in the space of three days. By January 1942, only 4,000 of the 70,000 Jews who were in Latvia at the beginning of the war were still alive. The Arajs Kommando working with the Einsatzkommando was responsible for more than half of these killings.

Kalejs and his unit had two other duties besides killing Jews in the Riga ghetto. Outside of Latvia (usually in Russia) the Arajs Kommando joined the German SS in so-called anti-partisan activity, which was little more than a cover for arresting and murdering civilians. In addition, the Arajs Kommando under the leadership of Kalejs served as guards at the Salaspils concentration camp. The conditions there were brutal, although Salaspils was a labor camp whose inmates died primarily

from inhumane conditions or being shot while trying to escape, rather than a killing camp such as Auschwitz where the prisoners were systematically murdered in gas chambers. The Arajs Kommando was charged with guarding work details and preventing escapes at Salaspils.

The United States has the authority to deport Nazi collaborators for assisting in the persecution of innocents because of their race, religion,national origin or political opinion, 8 U.S.C. § 1182(a)(3)-(E), and for lying about a material fact on immigration forms, Fedorenko v. United States, 449 U.S. 490, 506. The government alleges that Kalejs is guilty of both. We will deal with each accusation in turn although the issues are married because of course the reason former Nazis lie on their immigration forms is that they would

not gain admission if they told the truth about their war crimes. Stephen J. Massey, *Individual Responsibility for Assisting the Nazis in Persecuting Civilians*, 71 Minn. L. Rev. 97, 106 (1986). The Holtzman Act confers on the United States the power to deport, or keep out in the first instance:

> Any alien who, during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with--
>
> (I) the Nazi government of Germany,
>
> (II) any government in any area occupied by the military forces of the Nazi government of Germany,
>
> (III) any government established with the assistance or cooperation of the Nazi government of Germany, or
>
> (IV) any government which was an ally of the Nazi government of Germany,
>
> ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion
>
> * * *

8 U.S.C. § 1182(a)(3)(E).

Assigning personal responsibility in a

military regime is complex, particularly with regard to Holocaust era crimes because the Nazis' murderous proficiency insured there would be few witnesses. In only a handful of these cases are there people who can place the accused at the scene of a specific crime with a gun in his hand. The same is true here. The Holtzman Amendment's non-criminal provision thus makes *assistance* in persecution an independent basis for deportation, and assistance may be inferred from the general nature of the person's role in the war; therefore, the atrocities committed by a unit may be attributed to the individual based on his membership and seeming participation. The Supreme Court suggested in Fedorenko, for example, that an armed guard at a concentration or labor camp assisted in persecution under the statute, no matter that it could not be proved he

committed a specific atrocity and despite the fact that the guard acted at the direction of a camp commandant. 449 U.S. at 512 n.34. As we recently said,

> If the operation of [a concentration] camp were treated as an ordinary criminal conspiracy, the armed guards, like the lookouts for a gang of robbers, would be deemed coconspirators, or if not, certainly aiders and abettors of the conspiracy; and no more should be required to satisfy the noncriminal provision of the Holtzman Amendment that makes assisting in persecution a ground for deportation.

Kairys v. Immigration and Naturalization Service, 981 F.2d 937,943 (7th Cir. 1992), certiorari denied, 113 S.Ct. 1832. See also Schellong v. Immigration and Naturalization Service, 805 F.2d 655, 660, 662 (7th Cir. 1986), certiorari denied, 481 U.S. 1004; United States v. Kairys, 782 F.2d 1374, 1377n.3 (7th Cir. 1986), certiorari denied, 476 U.S. 1153.

According to testimony, Kalejs was not "merely" a guard at a concentration camp but the commander of such guards. In addition, he was a key officer in a unit that has been proved by eyewitness testimony and Nazi-era documents to have killed tens

of thousands of innocents. The charges levelled against Kalejs, if true, undoubtedly qualify as assistance in persecution under the Holtzman Act. Kalejs' status as an officer in the Arajs Kommando probably qualifies as ordering, inciting and participating in persecution under the Act as well. Dr. Hilberg's expert opinion was that, in this instance, attributing the atrocities of the group to the individual is logical because an officer in the Arajs Kommando would have "as a matter of course" participated in the slaughter. Kalejs' primary defense, then, is to deny membership in the Arajs Kommando. He argues that the immigration judge and BIA relied on inherently untrustworthy evidence and that, even on its own terms, the evidence does not establish his guilt.

The government produced a number of

documents from 1941 to 1945 referring to Konrads Kalejs as a member, company commander or first lieutenant of the Arajs Kommando. One was a form submitted to the University of Riga on November 28,1941, and signed by the head of the unit, Viktors Arajs, that said, "First lieutenant Konrads Kalejs has been a member of the Latvian Auxiliary Security Police from 29 July, this year, to the present." Recall that the Latvian Auxiliary Security Police was the official name of the Arajs Kommando.Another form submitted by the deputy chief of the Kommando on November 5, 1942,provides that "First Lieutenant Konrads Kalejs born on 26 June 1913, has been in the service of the Latvian Security Section since 30 July 1941 and was at the Eastern front between 14 February 1942 and 27 April 1942." Even more compelling is a note in Kalejs' handwriting, dated

"Riga, 15 May 1943," to the university registrar that says, "I hereby inform you that I am in the service of the Commander of the Security Police and SD of Latvia--in the Latvian Security Section as a company commander" (App. at 56). The record in this case is strewn with similar documents including certified copies of officers' identification badges. The United States also produced three witnesses who testified that Kalejs was a company commander and first lieutenant in the Arajs Kommando; four witnesses placed Kalejs as a head guard at the Salaspils concentration camp.

Kalejs first took the Fifth Amendment at his deportation hearing. When he decided to testify, Kalejs explained these damning documents by saying that, in order to continue his studies at the university, he

needed to demonstrate participation in the German war effort. A friend helped him procure these affidavits, petitioner maintains, and told him what to write. He did not know Viktors Arajs and did not learn the true nature of the Arajs Kommando until the war was over. He was also utterly unaware that Jews, Gypsies and Communists were being executed in mass numbers in Latvia. As Kalejs tells it, he was merely a student in early 1942 when he joined a police unit of skiers and was sent to the eastern front. Then, in late 1942, he developed an ulcer and was out of commission for twenty-seven or twenty--eight months, although he continued to receive his military salary from the Germans. He continued to study and worked part time on a farm. In 1943 he married and lived with his parents in Riga. He was called to report to the Latvian Legion in

1944 and was sent for training in late 1944 and early 1945 to Germany. At the war's end he became police chief ina displaced persons' camp.

The immigration judge and the BIA did not believe Kalejs' denials and neither do we. He does not explain, for example, how he so easily obtained affidavits identifying him as not merely a member but an officer of the Arajs Kommando, or why he didn't simply obtain a certificate from the unit he claimed to be a member of. It is also incredible that the Germans would have continued to pay the military salary of a Latvian soldier for two-and-a-half years while he was recuperating from an ulcer, studying and laboring on a farm. Kalejs claims to have had no knowledge of the mass executions of Jews outside Riga, but according to expert testimony the

subject had set the town abuzz at the time. And Kalejs admitted to serving under a general who was head of the Einsatzgruppe, the mobile killing unit, in Latvia, although he later tried to distance himself from this testimony. Finally, there are multiple witnesses including other members of the Arajs Kommando who placed Kalejs in the unit as an officer as well as at Salaspils concentration camp. Several of these witnesses identified Kalejs as the man they knew from an array of 250 photographs, a stunning indictment given the fifty years that have passed since any of these people had seen the accused. We hold, therefore, that the BIA was amply justified in concluding that Kalejs assisted in the persecution of people because of their race, religion, national origin or political beliefs within the meaning of the Holtzman Act.

The second ground for deporting Kalejs is his fraudulent statements on immigration forms. On December 3, 1958, Kalejs appeared before an American vice consul in Melbourne, Victoria, Australia, and signed a statement (swearing that he was telling the truth) that listed his activities since the age of sixteen. The twenty--fifth question on the visa application asked for a list of residences and occupation(s). Kalejs wrote that he was a member of the Latvian Army from 1929 to 1941, but that from 1941 to 1944 he was a farm laborer and lived in Nurmuiza, Talsi, Latvia. Petitioner admits in his brief that this information was false or at least incomplete but makes the extraordinary argument that there was not space on the form to give an accurate description. Even Kalejs admits that he received a military salary throughout the war; he

could have said "soldier" or "military" or "army" in as little space as "farm laborer." And given our conclusion that Kalejs was actually an officer in a brutal pro-Nazi military unit, the description "farm laborer" was not even a partially accurate description of Kalejs' activities during the war. The real reason Kalejs decided to lie, of course, was not an absence of space on the visa application--after all, he also had a personal interview with American consular officials during which he could have given a more expansive and accurate representation of his war years--but the fear that he would not be allowed to enter the United States if his true involvement were known. Kalejs admitted as much in a 1984 deposition taken before he had obtained counsel or attempted to flee from American authorities and deportation hearings.

The government may deport or exclude "any alien who, by fraud or wilfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or entry into the United States * * *." 8 U.S.C. § 1182(a)(6)(C)(i). This statute requires that the government prove by clear and convincing evidence four things: (1) the person misrepresented or concealed some fact; (2) the person did so willfully; (3) the fact was material; and (4) the misrepresentation resulted in the person obtaining a visa, documentation or entry into this country. Kungys v. United States, 485 U.S. 759, 767. There is no question in this case that Kalejs' visa applications violated prongs one and two; that is, Kalejs misrepresented facts and he did this willingly. In fact, Kalejs admitted as much on two occasions. The

issue,then, is whether petitioner's lies were material and whether they resulted in his acquisition of the U.S. visa. Under Kungys, a false statement is material if it had a natural tendency to influence the decisions of the Immigration and Naturalization Service. Id. at 772. Once materiality is proved by clear and convincing evidence, the government is deemed to have established a rebuttable presumption that the person got his visa because of the misrepresentation. The accused may rebut the presumption by showing through a preponderance of the evidence that the statutory requirement for admission was met regardless of the falsehood. Id. at 777. This is most definitely not a "but for" analysis,according to the Court; that is, the government need not establish that "but for" the misrepresentation, the person would have been denied entry. Id. at

777-779. Obviously, since materiality has been defined as the tendency to influence immigration officials, it is intertwined with the question of whether the person obtained a visa because of the misrepresentation. In essence, the materiality requirement is designed to exclude trivial or irrelevant misstatements and the obtaining or procuring requirement is designed to measure how heavily officials relied on the falsehood.

Kalejs argues that Kungys does not apply to him because that decision was not rendered until all the evidence was submitted in his case. This is not correct. Kungys was actually decided on May 2, 1988, three months before Kalejs began his defense. Even so, Kungys would apply. Petitioner relies on Allen v. Hardy, 478 U.S. 255, for the proposition that for him to be

bound by the new rule of law enunciated in Kungys would be unjust. But Allen was a criminal case in which anew constitutional rule was announced; the instant case is a civil proceeding in which a statutory interpretation was merely clarified. Where the Supreme Court has applied a rule of law to litigants in one case, we are bound to apply the same rule to all others in the civil context unless specific procedural rules or res judicata prevents it. James B. Beam Distilling Co. v.Georgia, 111 S.Ct. 2439. Moreover, even if Kungys did not apply to Kalejs, his misrepresentations would still be material under Chaunt v. United States, 364 U.S. 350, 355, since "facts were suppressed which, if known, would have warranted denial of citizenship or * * * [whose] disclosure might have been useful in an investigation possibly leading to the discovery of other

facts warranting denial of citizenship."

When Kalejs applied to enter the United States, consular officials had the authority under 8 U.S.C. § 1182(a)(27) to exclude those who "seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States." This statute conferred great discretion on consular officials and, according to testimony at Kalejs' hearing, it was frequently employed in the late 1950s to exclude those suspected of Nazi involvement. Two former consular officials told the immigration judge that State Department policy in 1958 when Kalejs applied for a visa was to explore in great depth the wartime activities of German collaborators, and anyone

with serious involvement in Nazi activity would have had their applications denied. If Kalejs had told the truth about any part of his war service in the Arajs Kommando, it would certainly have prompted further inquiry--in this sense the lies undoubtedly tended to influence the decision of American officials to permit Kalejs to enter the country, the test under Kungys--and would probably have tipped the scales entirely against admitting him. This establishes a rebuttable presumption that Kalejs would not have been admitted to this country had he told the truth, and Kalejs has done nothing to refute this notion. We hold, therefore, that Kalejs' lies on immigration documents were material and resulted in his obtaining a visa and admission to the United States. He is thus deportable for lying on his immigration forms, although as

noted the BIA was also justified in deciding to deport Kalejs for persecuting innocents.

Petitioner finally argues that we should scrap most of the evidence against him because it is inherently unreliable. A number of witnesses were deposed in Riga in September 1987 in what was then part of the Soviet Union, and many Nazi-era documents were stored in Soviet-controlled archives. Moscow recognized Latvia's independence in September 1991 before the Soviet Union itself dissolved, but those events do not alter this case. According to Kalejs, prosecutors erred in considering evidence from the Soviet Union and then compounded their error by failing to allow the accused to engage in sufficient discovery so that he could prove the Soviet treachery. At its heart, this is a

claim about the denial of due process. First, we reject out of hand the overarching argument that any evidence flowing from the Soviets is fundamentally flawed because, as the petitioner's brief points out, "Lenin as a founder of his country was no George Washington" (Brief at 35). It is true that Lenin might not have fessed up to chopping down cherry trees, and we do not discount the possibility that the Soviets may have manufactured evidence in some cases involving Nazi collaboration to excuse their own conduct in the war. But we have relied on evidence from the Soviet Union before, see, e.g., Kairys, 783 F.2d 1374, and Kalejs has not pointed to any reason why the Soviets would want to implicate him personally, or demonstrated any unusual interest in his case by Soviet authorities. Where, as here, the Soviet evidence is corroborated

by Western documentation, plus reliable eyewitness testimony subject to vigorous cross-examination, and the evidence is credible on its own terms, we will not discard a case against a Nazi collaborator merely because some of the evidence originated in the Soviet Union.

More specifically, Kalejs complains that (1) he could not interview witnesses before their depositions were taken in the Soviet Union; (2) witnesses' previous statements were withheld; (3) the witnesses should have been deposed in the United States rather than the Soviet Union; (4) Kalejs could not attend the depositions; (5) witnesses were intimidated by the Soviet prosecutors; and (6) neither Kalejs' attorney nor United States officials could rent cars and visit the sites of the atrocities or examine Soviet ar-

chives. We can easily dismiss most of these claims because there is no general right to discovery in a deportation hearing so long as the accused had reasonable opportunity for cross-examination, as there was here. Kulle v. Immigration and Naturalization Service, 825 F.2d 1188, 1194 (7th Cir. 1987), certiorari denied, 484 U.S. 1042. The Federal Rules of Civil Procedure simply do not apply, thus most of the cases cited by Kalejs are irrelevant. In one instance in his brief, Kalejs actually attempts to hold the government to the standards of a criminal proceeding under Washington v. Texas, 388 U.S. 14 (Brief at 32). Such cases are wholly inapplicable. Clearly, the stakes of deportation hearings are great in terms of reputations and disruptions to lives, and we must ensure that such proceedings do not turn into kangaroo courts. But the

hearings in this case were conducted with eminent fairness to Kalejs.

Also, many of Kalejs' due process claims are patently ridiculous. The depositions were taken in the Soviet Union because the witnesses were too old and frail to travel to the United States. Kalejs did not attend because he did not ask to attend, and so waived that issue even if it had merit. The government actually did turn over to Kalejs' counsel all witness statements it had in its possession; those witnesses for whom the United States did not have previous statements were by and large witnesses called by Kalejs himself to corroborate his case. As noted, there is no general right to discovery in a deportation hearing, but there is certainly no right to discovery of documents that the government does not have in its possession and is

unable to obtain. Finally, the accused has not told us and we cannot even begin to imagine what Kalejs would hope to uncover by visiting the sites of atrocities committed fifty years ago. In short, Kalejs received ample due process. We reject this and all other claims made by the petitioner.

For the reasons stated above, the BIA's decision to deport Konrads Kalejs is affirmed.

MANION, *Circuit Judge*, concurring. The Board of Immigration Appeals determined that Kalejs should be deported under U.S.C. §§ 1251(a)(1)(A), 1251(a)(1)(B) and 1251(a)(4)(D). I concur. Although I agree with the dissent that "evidence" generated under the watchful eye of the Soviet dictatorship is inherently unreliable and has no place in an American pro-

ceeding, I think the untainted evidence supports the Board's decision. Therefore, I agree that the Board's decision to deport Kalejs should be affirmed.

The dissent properly recognizes the reality of the "evil empire," brought into full view recently by the fall of the Iron Curtain.[1] The dissent, however, fails to consider the highly deferential standard by which we review Board deportation decisions. Sivaainkaran v. I.N.S., 972 F.2d 161, 163 (7th Cir. 1992). "We must uphold the Board's determination if it is 'supported by reasonable, substantial, and probative evidence on the record as a whole, ...'" Id.; 8 U.S.C. § 1105(a)(4).

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[1] The court is correct that neither Lenin nor his successors Stalin, Khruschev or Brezhnev "fessed up to chopping down cherry trees." Opn. at 12. I would add to this observation that they also never fessed up to imposing a corrupt system on the people they ruled, nor to maintaining that system through intimidation, lies, and the wholesale slaughter of millions of people.

The evidence which exists independent of any Soviet taint includes the expert testimony of Dr. Raul Hilberg, set forth at length throughout the court's opinion, and Kalejs' own testimony concerning the University of Riga documents which confirm his service in the Latvian Security Section, also discussed at length in the court's opinion at 8. The record must be taken as a whole; as a whole, the tainted Soviet depositions and documents merely confirm the untainted evidence. The evidence is, therefore, sufficient to satisfy the deferential substantial evidence test. The Board's decision of deportation is, accordingly, conclusive. § 1105(a)(4). I, therefore, concur.

EISELE, Senior District Judge, dissenting.

Konrads Kalejs is now 80 years of age.

He is a native of Latvia and a naturalized citizen of Australia. He resided in Latvia from 1941-1944 during the German occupation. In 1959 he was admitted to the U.S. as a permanent resident based upon his application to the American Consulate in Australia. He was arrested in Florida on April 19, 1985, as a result of this deportation action which was brought pursuant to § 241(a)(1), 241(a)(2), and 241(a)(19) of the Immigration and Naturalization Act of 1952, as amended. 8 U.S.C. § 1251(a)-(1), 1251(a)(2), 1251(a)(19). A final Order of Deportation was entered on April 30, 1992. On May 22, 1992, Kalejs filed a Petition for Review in this Court pursuant to 8 U.S.C. § 1105(a). Such a Petition for Review is the sole and exclusive procedure for the review of final orders of deportation.

The record on review consists of some twenty volumes containing almost 8,000 pages but there are only two major allegations that we must deal with:

1) Whether Mr. Kalejs participated in, or assisted in, persecution under the Holtzman Amendment, and

2) Whether Mr. Kalejs made any wilful misrepresentation as to a material fact in the application he made in connection with the issuance of his United States visa.

The two issues are interrelated. In his application for a visa in 1959, Mr.Kalejs claimed that he had been a farm laborer during the war. Although he may have worked from time to time on a farm during that period, this cannot be considered a true statement. But we need to know the real truth in order to determine if this

falsehood constitutes a misrepresentation of a material fact which would justify his exclusion in 1959. It appears that if he had stated that he had served in Latvian military units fighting with the Germans against the Russians, and if that representation were true, he would not, on that basis alone, have been excluded from entry in 1959. And if that were the truth, then it appears that the false statement (that he was a farm laborer) would not alone have been deemed material so as to preclude his entry into the U.S. at that time.[1]

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[1] The "materiality" analysis explained in Petkiewytsch v. INS, 945 F.2d 871, 881 (6th Cir. 1991) is helpful:

We agree with the Maikovskis court that when an alien has made misrepresentations, "the materiality of the misrepresentations is established where the government shows that disclosure of the concealed information probably would have led to the discovery of facts warranting the denial of a visa." 773 F.2d at 442. In view of our conclusion that Petkiewytsch's service for eight months as a guard at Kiel-Hasse did not subject him to deportation, we do not believe his failure to disclose that conduct related to a "material fact."

But the respondent contends and believes that Mr. Kalejs participated in the persecution of Jews and others and was, indeed, a member of a "killing squad" that murdered some 29,000 persons before August 10, 1941. And, more specifically, it is also contended that Mr. Kalejs was involved in the killing of 27,000 people on November 30, 1941, and another 17,000 on December 8, 1941. One can legitimately ask: if the respondent INS had not believed that Kalejs participated in, or assisted in, such persecution, would it nevertheless have maintained that he should be deported because of a wilful misrepresentation of material fact on his application for a visa? So the two issues cannot be clinically separated in my opinion. If the allegations that Mr. Kalejs participated and assisted in persecution cannot be sustained on this record then

the basis for determining whether the visa application misrepresentation was material will also be undercut.

The Amended Order to show cause contained 25 allegations. The first 6 were not seriously contested. The remaining allegations (7-25) relate to three major substantive issues, one of which has several sub-parts.

The first issue was whether Mr. Kalejs' membership or activities in an unnamed Latvian self-defense unit at Litene in mid-July, 1941, shortly after the invasion of Lat- via by Germany, constituted participation in persecution. The Immigration Judge thought not and the BIA made no finding.

The next issue was whether Mr. Kalejs was a member of the Arajs Kommando and, if so, whether his activities in that unit

constituted participation in persecution. This issue had four sub-parts:

1) Concerning activities from July, 1941, until December, 1941. The IJL stated that ". . . the evidence reflects that the respondent signed his name to the rolls of the Arajs Kommando in July [1941] . . . There is no evidence of participation or assistance beyond this act . . . I find the government has failed to sustain its heavy burden of proof . . ." The BIA reversed.

2) Concerning the period from January, 1942, to November, 1942. The Immigration Judge found ". . . respondent was a member of Arajs Kommando . . . on the eastern front from January through fall of 1941, . . . and that respondent assisted and participated in this persecution." The BIA reversed.

3) For the year 1943. The Immigration Judge ruled ". . . respondent was the Company Commander of a guard unit at a camp for Latvian Jews in Porkof, and that members of his company participated in the execution of 20-39 gypsies in Porkof . . . respondent assisted in persecution . . . in Porkof in 1943." The BIA affirmed.[2]

4) Dealing with Mr. Kalejs' alleged role as a Company Commander of the external guard unit at Salaspils and Sauriesi concentration camps. The Immigration Judge found ". . . respondent was a Company Commander under the Arajs Kommando and German SD of the armed exterior guard unit at Salaspils and Sauriesi

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[2] The IJ and BIA agreed that in 1943 Kalejs acted as a company commander in the Arajs Kommando of a guard unit at Porkov concentration camp which guarded some 20-39 gypsies before, but not at the time, the Nazis shot them. The sole evidence for this finding came from the deposition of one Soviet witness.

. . .Respondents' positions and activities at [these camps] constituted assistance and participation in persecution . . . ." The BIA affirmed.

The third major issue is whether Mr. Kalejs misrepresented to the American Consulate his membership and activities in connection with the Arajs Kommando and, if so, whether such misrepresentation was material. The Immigration Judge found that ". . . . respondent's failure to reveal his wartime activities when applying for his U.S. visa was a willful and material misrepresentation." The BIA affirmed.

The lack of congruity between the findings of the IJ and the BIA on the various issues is striking. They disagreed on all but the following: The BIA affirmed the IJ's ruling that Kalejs was the company

commander of a guard unit for Latvian Jews at Porkov and "that members of his company participated in the execution of 20-39 gypsies in Porkov." And the BIA affirmed the IJ's finding that Kalejs was the company commander of the exterior guard unit at Salaspils and Sauriesi concentration camps and that his "positions and activities" at [those camps] constituted assistance and participation in persecution. Finally,the BIA affirmed the IJ's finding that Kalejs' failure to reveal his wartime activities in his visa application constituted a wilful and material misrepresentation.

It is the contention of the petitioner that the proof of his participation or assistance in persecution did not meet the "clear and convincing" standard of proof. He argues that the video depositions of

persons controlled by the Soviet Union which were taken in the Latvian Soviet Socialist Republic should not have been admitted into evidence and, in any event, should be disregarded in any assessment of the factual basis for the charges against him. He argues that the restrictions placed upon him and his attorneys deprived him of the opportunity to develop his defense or to participate in meaningful cross-examination of the Soviet controlled witnesses. He also contends that the Soviet Union placed the same restrictions upon the U.S. Government as it did upon him, thereby depriving the Government of any realistic opportunity to evaluate the truthfulness of the Soviet controlled witnesses upon whom it relied. He asks: how can our government vouch for the testimony of witnesses it was unable to interrogate? How could it evaluate the

witnesses' testimony without having access to their earlier written statements or previous testimony taken years ago and much nearer the events at issue? He argues that the testimony taken in the Soviet Union, under the control of the then Soviet Government and under the restrictions imposed, was inherently unreliable. But the petitioner's contention with respect to the Soviet witnesses is better stated in his own words:

> The Soviet Union did not permit the United States to independently, privately interview the Soviet witnesses, nor for that matter to interview Soviet witnesses at all prior to the taking of the video taped depositions. The United States was not permitted to visit the Russian sites of the conduct charged; it was not permitted to independently investigate within the Soviet Union in efforts to find its own witnesses; it was not permitted to visit and search the Soviet archives; it was not permitted to inspect and review the prior written statements of the Soviet witnesses that were refused to the defense. OSI's expert witness, Dr. Hilberg was not permitted to visit any Soviet ar-

> chives. OSI's attorneys and investigators were not permitted self drive car rentals and their visas were restricted to Riga just as the defense attorney's. OSI's response is parity--that OSI was also denied the same witness statements and investigation in the Soviet Union. But, OSI's failure to investigate and confirm Soviet witness reliability exacerbates rather than ameliorates the deficiencies. The Soviet deposition evidence adduced in this case has not been adequately investigated by our government. The deposition evidence is unverified. What was produced on the Soviet video tapes is the spoonfed creation of the KGB untested by the defense and untested by OSI. OSI can not vouch for the accuracy of the Soviet offered evidence.

Kalejs' Opening Brief, pp. 33-34.

It will be helpful to review the procedural background to these contentions.

After a change of venue, the case was assigned to Immigration Judge Petrone. The Office of Special Investigation (OSI) moved for permission to take evidentiary depositions in the Latvian Soviet Socialist Republic. Mr. Kalejs asked for copies of all prior witnesses' statements. The

OSI agreed to provide such statements that were in its possession in advance of the trip to the Soviet Union. The trouble was that there were many acknowledged prior statements made by the Soviet witnesses which were not in the possession of the OSI and which were not produced by the Soviets. Mr. Kalejs also asked for site visits and the opportunity to go into the Soviet controlled archives where relevant documents are allegedly maintained.[3] Such opportunities were denied to the defense. It obviously would have been to the interest of the defense if Mr.Kalejs could have personally attended the taking of the Soviet depositions. However, due to the terms of his bond and the refusal of the Soviet Government to disclose whether

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[3] It appears that the expert relied upon so heavily by the government, Dr.Hilberg, did have access to some of this archival information but only that which was supplied by the Soviet government. He was not permitted to visit the archives.

criminal charges would be placed against him in the Soviet Union, he was, as a practical matter, unable to attend with his attorneys. It does not seem unreasonable that he would be greatly concerned that the Soviets would detain and charge him if he attended the depositions. After all he had deserted from the Red Army and had admittedly fought with Latvian units in support of the Germans against the Soviets. So I have difficulty with the majority's assertion that ". . . Kalejs has not pointed to any reason why the Soviets would want to implicate him personally or demonstrated any unusual interest in his case by Soviet authorities." If history is to play a major role in the government's case against Mr. Kalejs, as appears to be the situation, then one would want not only the history of the German Nazi's plans and actions and those

of their evil collaborators, but also the plans and actions of the Soviets during the events at issue and subsequent thereto during prosecutions of those alleged by the Soviets to be responsible. For history is revealing more and more as time goes by that the evil deeds of the Soviet Union in this area of the world were second only to those of the Nazi regime. But I will have more to say later about the "expert" evidence relied upon by the government in this case.

Basically my problems with these proceedings arise out of my belief in the importance and efficacy of process in reliably resolving factual issues, that is, in establishing the truth. And without first establishing the truth, we can have no confidence in the justness of the outcome.

If I believed that there exists in this record a reliable evidentiary basis for the following "facts", as quoted from the majority opinion, that is, that such "facts" had been reliably established, using appropriate due process standards, I would of course concur in that opinion:

> Konrads Kalejs was born on June 26, 1913, in Riga, Latvia. He was educated as a professional soldier and served as a lieutenant and first lieutenant in the Latvian military. In 1940, the Russians overran Latvia. Kalejs salvaged his military career by joining the conquering Red Army, but a year later the Russians were themselves pushed out of Latvia by the Nazis, whose forces were driving relentlessly toward Russia on the eastern front. Again Kalejs sided with the victors; he deserted his Red Army comrades and, according to the evidence presented here, joined a pro--German force called the Latvian Auxiliary Security Police. The unit was allegedly known as the Arajs Kommando after its leader Viktors Arajs, who was convicted by a German court and sentenced to life imprisonment in 1979 for committing wartime atrocities. (Arajs died in prison.) According to the Justice Department, from July 1941 until at least June or July of 1944, Kalejs was a company commander and first lieutenant in

the Arajs Kommando.

The Nazis' policy in Latvia (as elsewhere) was to murder all Jews, Gypsies and many Communists. After the German Army swept through an area, a mobile killing crew would follow shortly, hoping to catch victims unaware. These mobile killing units were called the Einsatzgruppe or, in Latvia, the Einsatzkommando. According to the government's expert witness in the case against Kalejs, Dr.Raul Hilberg, a renowned Holocaust scholar and professor of political science at the University of Vermont, the Einsatzkommando assigned to Latvia had just 170 members. The logistics of attempting the systematic annihilation of the 70,000 Jews in Latvia prompted the Einsatzkommando to rely on bands of local soldiers. The Arajs Kommando was such a group. As a company commander, Kalejs was one of six or seven officers who were second in command to Arajs; he had a hundred men or more under his direction.

Dr. Hilberg testified that according to German documents, the Einsatzkommando with the help of the Arajs Kommando and similar local groups managed to murder 29,000 people (90 percent of them Jewish) before August 10, 1941. A few months later, in order to make room in Riga's Jewish ghetto for the thousands of Jews whom Hitler had shipped out of Germany, 27,800 Jews were shot in the woods near Riga in the space of three days. By January 1942, only 4,000 of the 70,000 Jews who were in Latvia at the beginning of the war were still alive. The Arajs Kommando working with

the Einsatzkommando was responsible for more than half of these killings.

Kalejs and his unit had two other duties besides killing Jews in the Riga ghetto. Outside of Latvia (usually in Russia) the Arajs Kommando joined the German SS in so-called anti-partisan activity, which was little more than a cover for arresting and murdering civilians. In addition, the Arajs Kommando under the leadership of Kalejs served as guards at the Salaspils concentration camp. The conditions there were brutal, although Salaspils was a labor camp whose inmates died primarily from inhumane conditions or being shot while trying to escape, rather than a killing camp such as Auschwitz where the prisoners were systematically murdered in gas chambers. The Arajs Kommando was charged with guarding work details and preventing escapes at Salaspils.

The horror of the Holocaust and certain accepted historical facts can create a cloud, or an inertial wave, that can engulf the innocent as well as the guilty.[4] And the circumstance that there is no statute of limitations in cases of this

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[4] This is certainly not to suggest that Mr. Kalejs is innocent, or, for that matter, guilty. It is to emphasize the need for cautious objectivity which, although always important, is doubly so in these emotional circumstances.

type--and most would agree, properly so---should not make us close our eyes to some of the problems with which such limitation rules are intended to deal: staleness, loss of memory, the death of witnesses and the disappearance of documentary and other evidence. Frustrations arising out of the difficulties experienced in bringing evil persons to justice some 50 years after their crimes may dull concerns for the due process requirements of our law. And when the vehicle for the inquiry into a person's alleged participation in persecution during the early 1940s is a statute, such as the Holtzman Amendment, one must guard against the tendency to expand that "net" beyond the ordinary and natural meaning of the language employed.

So just as I am concerned about the reliability of the factual findings stated

by the majority, I am also not confident that the majority has correctly defined the reach of the Holtzman Amendment and particularly the phrase "assisted or otherwise participate in the persecution of any person because of race, religion, national origin or political opinion." The majority states:

> Assigning personal responsibility in a military regime is complex, particularly with regard to Holocaust era crimes because the Nazi's murderous proficiency insured there would be few witnesses. In only a handful of these cases are there people who can place the accused at the scene of a specific crime with a gun in his hand. The same is true here. The Holtzman Amendment's non-criminal provision thus makes assistance in persecution an independent basis for deportation, and assistance may be inferred from the general nature of the person's role in the war; therefore, the atrocities committed by a unit may be attributed to the individual based on his membership and seeming participation.

"Assistance" can only take us so far. It is equivalent to "aid and abet." Both to

"participate in persecution" and to "assist in persecution" should require acts and conduct coupled with the pertinent culpable state of mind. It is doubtful that a deportation statute could be written, constitutionally, to omit either of these requirements. In any event, the Holtzman Amendment, in my opinion, requires both. But, of course, these requirements may be established by circumstantial, as well as direct, evidence. Even so, I do not believe that "atrocities committed by a unit may be attributed to the individual based [solely] on his membership and seeming participation."

I agree with the majority's citation of the language in Kairys v. INS, 981 F.2d 937, 943 (7th Cir. 1992), cert. denied, 113 S.Ct. 1832 (1993), analogizing the provisions of the Holtzman Amendment to

the requirements of an "ordinary criminal conspiracy." And we know that co-conspirators must have knowledge of the illegal purposes of the conspiracy and act in some way, however minor, to help the conspiracy succeed.

So I disagree with Mr. Stephen Massey's conclusion in his article "Individual Responsibility for Assisting the Nazis in Persecuting Civilians," 71 Minn. Law Review 97, 169 (1986), cited by the majority, in which he argues that persons assist in persecution if they personally participated in persecution or "knowingly and more than minimally contributed to a group that persecuted civilians." Mr. Massey does not agree with Laipenieks v. INS, 750 F.2d 1427 (9th Cir. 1985) requiring "personal active assistance or participation."

One of the more complete discussions of the issue will be found in Petkiewytsch v. INS, 945 F.2d 871, 876-881 (6th Cir. 1991) where some very different "line drawing" by the Seventh Circuit and the other Circuits is described:

> The "line drawing" in cases under the Holtzman Amendment has been particularly difficult and has produced conflicting results. In Schellong v. INS, 805 F.2d 655 (7th Cir. 1986), cert. denied, 481 U.S. 1004 107 S.Ct. 1624, 95 L.Ed.2d 199(1987), the court of appeals applied the Holtzman Amendment to affirm the deportation of a person who voluntarily joined a special commando unit of the Nazi SS and served as an armed guard at two concentration camps. Id. at 656-57. There was no evidence, however, that Schellong personally engaged in physical abuse of prisoners while serving as a guard. Id. at 657. The court noted that it had previously held in United States v. Kairys, 782 F.2d 1374 (7th Cir.) cert. denied, 476 U.S. 1153, 106 S.Ct. 2258, 90 L.Ed.2d 703(1986), that service as a guard at a concentration camp equaled persecution under the DPA [Displaced Persons Act] without proof of personal involvement in atrocities. Id. at 660. Concluding that the purposes of the two statutes were [26] identical, the court found that proof of Schellong's service as a guard at a

concentration camp established that he had "assisted in persecution for purposes of Section 1251(a)(19)" and therefore was deportable. Id. at 661. The court specifically rejected the argument that an individual must have actively or personally participated in persecution to be deportable under the Holtzman Amendment as inconsistent with Fedorenko. Id. This holding was reaffirmed in Kulle v. INS, 825 F.2d 1188 (7th Cir. 1987), cert. denied, 484 U.S. 1042, 108 S.Ct. 773, 98 L.Ed.2d 860 (1988).

Another court reached a different conclusion in Laipenieks v. INS, 750 F.2d 1427 (9th Cir.1985), a deportation proceeding under the Holtzman Amendment against a native of Latvia. The petitioner had served voluntarily as a member of the Latvian Political Police, an organization formed to investigate and arrest individuals who participated in Soviet atrocities against Latvian citizens during the period of Soviet domination which preceded Nazi occupation, Id. at 1429. Although Laipenieks admitted slapping Soviet sympathizers taken as prisoners, the court of appeals found that the INS failed to establish by clear and convincing evidence that Laipenieks' individual conduct had been motivated by the political opinion of the prisoners. Relying on the legislative history of the Holtzman Amendment, the court held that deportability under § 1251(a)(19) "may only be sustained when the evidence establishes that the individual in question personally ordered, incited, assisted, or otherwise participated in the persecution of individuals." Id. at 1431 (emphasis added).

> Relying on note 34 in Fedorenko and the legislative history of the Holtzman Amendment, the court concluded that the proper analysis under the Holtzman Amendment was whether there was "proof of *personal active assistance* or participation in persecutorial acts . . ." Id. at 1432 (emphasis added).

The opinion then goes on to explain the background of the Holtzman Amendment and its important legislative history:

> Although the Holtzman Amendment was designed to fill a loophole in the permanent immigration law and its language is similar to that found in the DPA, the legislative history indicates an intention, at least in part, to accomplish a different purpose. The DPA was designed to provide relief to the multitude of displaced persons and refugees in Europe after the end of World War II. The problem was one of immense proportions and there was need for immediate action. These factors doubtless account for the absence of any legislative history addressing the provision in the 1948 DPA excluding persons who had assisted in persecution and for the decision merely to incorporate portions of the IRO constitution. Thirty years later, when the Holtzman Amendment was adopted, it had become clear that some *war criminals*, actual perpetrators of the Holocaust and other *war crimes*, had entered this country under the 1952 Act. The Holtzman Amendment provided the basis for their

deportation.

The Holtzman Amendment's legislative history contains a clear and repetitive message that the amendment was intended to deny "sanctuary in the United States to Nazi war criminals" 124 Cong. Rec. 31,647 (1978) (statement of Rep. Holtzman) (emphasis added), and that the "bill applies to any person who committed war crimes under the Nazis . . ." id. at 31,649 (emphasis added). The specific discussion on the House floor in which Representative Holtzman explained the purpose and scope of the bill demonstrates that the focus of the bill's intent centers on Nazi war criminals. Indeed, reference to "Nazi war criminals" or "war criminals" is made no less than nineteen times during the short discussion in which the purpose and reach of the bill is explained. See 134 Cong. Rec. 31,646-50 (1978). At one point Representative Holtzman explained the bill as follows: "The bill as reported here contains an amendment that limits the language of the bill *solely to those persons who engaged in war crimes* . . ." 134 Cong. Rec.31,647 (1978) (emphasis added). Again she stated, "The bill is intended to cover *active participation* and not mere acquiescence by the population as a whole."Id. at 31,649 (emphasis added). Representative Holtzman was joined in explaining the bill by another subcommittee member, Representative Eilberg, who stated the bill's purpose:

> Mr. EILBERG. The purpose of this bill, which is cosponsored by all of

> the members of the Subcommittee on Immigration Citizenship and International Law, is to prevent the entry into, as well as facilitate the deportation from the United States of aliens *who have engaged in persecution* based on race, religion, national origin or political opinion under the Nazis.

Id. at 31647 (emphasis added). Mr. Eilberg and Ms. Holtzman each went on to make several additional references regarding the bill's applications to those who *engaged* in war atrocities. Id. at 31,647-48. Representative Eilberg also stated:

> That dreadful period in the history of mankind should forever serve as a tragic reminder to all civilized people of the terrible extremes to which an entire nation can be led by a small but highly organized group of demented and *ruthless leaders*. This bill addresses itself to the *members of that group -- to the perpetrators* of the "Holocaust."

Id. at 31,647 (emphasis added).

We appreciate the fact that statements in floor debate often do not truly reflect the purpose of an act of Congress. Nevertheless, this bill was the work of Representative Elizabeth Holtzman, and her statement of its purpose is entitled to careful consideration, particularly in view of the similar statements found in the committee report. Representative

Eilberg's statements concerning the intent of the subcommittee which first approved the Holtzman Amendment is equally persuasive.

The Holtzman Amendment's purpose of reaching war criminals is further clarified by statements in the legislative history indicating the degree of participation in persecution necessary to come within the Holtzman Amendment. The statement of the Holtzman Amendment's purpose reads:

Purpose of the Bill

> The purpose of the bill is to exclude from admission to the United States *aliens who have persecuted* any person on the basis of race, religion, national origin, or political opinion and facilitate the deportation of such aliens who have been admitted into the United States.

H.R. Rep. No. 95-1452, 95th Cong. 2d Sess. at 1, reprinted in 1978 U.S. Code Cong. & Admin.News 4700. This language appears to require active participation in persecution going beyond "assistance." In discussing the Holtzman Amendment's application, the House Report goes on to state that "it is important to stress that the conduct envisioned must be of a deliberate and severe nature and such that is condemned by civilized governments, . ." Id. at 7 1978 U.S. code Cong. & Admin. News at 4706.

Finally the Court integrates the legislative history of the Holtzman Amendment with the Fedorenko case:

> If, as the Supreme Court states, the focus under the DPA should be on the "particular conduct" of the immigrant, then given the legislative history of the Holtzman Amendment, the focus should be even more searching under § 1251(a)-(19). Although Petkiewytsch wore a uniform and carried a rifle, the Board found that he was at all times a reluctant civilian guard, once himself imprisoned for failing to perform his guard duties diligently. The camp where he served was the least punitive of all types of Nazi camps. The Board also found that the petitioner served under duress and that he was told he would be shot if he attempted to escape. He never personally engaged in acts of persecution, and was released by the British authorities, who interned him as a suspected war criminal, upon a finding that the charges could not be sustained. His "particular conduct" just does not fit the description of a "Nazi war criminal" or a "person who engaged in war crimes," repeatedly described as the class sought to be made deportable by the Holtzman Amendment.
>
> Given all the circumstances disclosed by this record we do not believe that Fedorenko requires a finding that Petkiewytsch is subject to deportation under § 1251(a)(19). Deporting this petitioner would not further the goal of the

> Holtzman Amendment and would carry out no discernable policy of the United States.

This discussion of the Holtzman Amendment and the proper "line drawing" thereunder becomes important only if it is determined that much of the evidence relied upon by the government to prove that Mr. Kalejs was a member of the Arajs Kommando and participated in persecution must be stricken and ignored. For if all of the government's evidence is accepted, including the Soviet depositions, then the deportation order would have to be affirmed.

As pointed out by the majority, Mr. Kalejs' basic attack is predicated on due process grounds. I quote the pertinent portions of the majority opinion:

> Kalejs presses upon us essentially three arguments: . . . that prosecutors relied on inherently untrustworthy evidence --

depositions and documents salvaged from the archives of the former Soviet Union -- and then compounded the error by denying him due process.

* * *

Petitioner finally argues that we should scrap most of the evidence against him because it is inherently unreliable. A number of witnesses were deposed in Riga, Latvia in September 1987 in what was then part of the Soviet Union, and many Nazi -era documents were stored in Soviet-controlled archives. Moscow recognized Latvia's independence in September 1991 before the Soviet Union itself dissolved, but those events do not alter this case. According to Kalejs, prosecutors erred in considering evidence from the Soviet Union and then compounded their error by failing to allow the accused to engage in sufficient discovery so that he could prove the Soviet Treachery. At its heart, this is a claim about the denial of due process.

* * *

More specifically, Kalejs complains that (1) he could not interview witnesses before their depositions were taken in the Soviet Union; (2) witnesses' previous statements were withheld; (3) the witnesses should have been deposed in the United States rather than the Soviet Union; (4) Kalejs could not attend the depositions; (5) witnesses were intimidated by the Soviet prosecutors; and (6) neither Kalejs' attorney nor United States officials could rent cars and visit the sites of the atrocities or examine Soviet archives.

The majority disposes of the due process

issue as follows:

> We can easily dismiss most of these claims because there is no general right to discovery in a deportation hearing so long as the accused had reasonable opportunity for cross-examination, as there was here. Kulle v. Immigration and Naturalization Service, 825 F.2d 1188, 1194 (7th Cir.1987), certiorari denied, 484 U.S. 1042. The Federal Rules of Civil Procedures imply do not apply, thus most of the cases cited by Kalejs are irrelevant. In one instance in his brief, Kalejs actually attempts to hold the government to the standards of a criminal proceeding under Washington v. Texas, 388 U.S. 14 (brief at 32). Such cases are wholly inapplicable. Clearly, the stakes of deportation hearings are great in terms of reputations and disruptions to lives, and we must ensure that such proceedings do not turn into kangaroo courts. But the hearings in this case were conducted with eminent fairness to Kalejs.
>
> Also, many of Kalejs' due process claims are patently ridiculous. The depositions were taken in the Soviet Union because the witnesses were too old and frail to travel to the United States. Kalejs did not attend because he did not ask to attend, and so waived that issue even if it had merit. The government actually did turn over to Kalejs' counsel all witness statements it had in its possession; those witnesses for whom the United States did not have previous statements were by and large witnesses

called by Kalejs himself to corroborate his case. As noted, there is no general right to discovery in a deportation hearing but there is certainly no right to discovery of documents that the government does not have in its possession and is unable to obtain. Finally the accused has not told us and we cannot even begin to imagine what Kalejs would hope to uncover by visiting the sites of atrocities committed fifty years ago. In short, Kalejs received ample due process.

Short of constitutional requirements, just what are the due process rights of aliens in deportation cases? The statute and regulations which identify certain of the rights of respondents in such civil proceedings are set forth as follows:

Section 1105 of Title 8 provides in part:

> The procedure prescribed by, and all the provisions of chapter 158 of Title 28 shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or

comparable provisions and of any prior Act . .

Section 1252(b) of Title 8 provides in part:

* * *

Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this chapter, as the Attorney General shall prescribe. Such regulations shall include requirements that are consistent with section 1252b of this title and that provide that--

* * *

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence on his own behalf, and to cross-examine witnesses presented by the Government, and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

8 C.F.R. § 242.16 (1988) provides in part:

Hearing.

(a) *Opening.* The Immigration Judge shall . . . . advise the respondent that he will have a reasonable opportunity to examine and object to the evidence against him, to present evidence in his own behalf and to cross-examine witnesses presented by the Government;

The government relied principally on its expert witness, Dr. Hilberg, and Soviet supplied documents and witnesses to establish Mr. Kalejs' membership in the Arajs Kommando and his assistance in persecution.

First, I have much difficulty with the majority's willingness to accept and rely upon the opinion testimony of the government's expert witness, Dr. Raul Hilberg, to establish critical ultimate facts, not just general historical background, in deportation prosecutions such as this. The stakes are too high, the consequence of error too great, to rely upon such compound hearsay. Dr. Hilberg is undoubtedly a renowned Holocaust scholar and historian. But are we really dealing with expert opinion here? Is it appropriate to use expert opinion to establish any and all

historical facts? All facts may be considered "historical" whether they relate to events occurring minutes ago, or 50 years ago, or 1000 years ago.

Dr. Hilberg concluded that Mr. Kalejs was a member of the Arajs Kommando. He based his opinion on certificates to the University of Riga, which were produced at the trial, on other documents that were *not* produced at the trial, and upon the statement of one Arthur Abols, who died in the early 1960's, that Kalejs was a company commander at Salaspils in the spring of 1943. Petitioner questions the existence of the Abols statement (which was not offered in evidence). He further notes that there is no explanation for its absence.

The government does not take exception to the following comments of petitioner's

attorney on Dr. Hilberg's testimony:

> Hilberg identified and testified from a chart prepared by OSI, Exhibit 19 (v. 9, 3197). The chart purports to be a table of organization from Hitler to the Arajs Kommando. The bottom line of the chart purports to name company commanders of the Arajs Kommando (v. 3, 842)--Cukurs, Kalejs, Kalnins, Laukers, Ozols, Svikeris (v. 9,3197). . . . Hilberg obtained all the names, except Kalejs' from the decision in the case of People vs. Arajs, District Court of Hamburg, 1980, Exhibit 22T, (v.11, 3634).
>
> The Soviet documents in evidence upon which Hilberg may rely relating to Kalejs during the war were represented to come from the Central State Historical Archive of the Soviets in Latvia (v. 12, Exhibits 23, 25, 37A, 44,45, 46). The defense was denied entry into those Archives. . . . Hilberg did not feel these documents compelling, however, he stated he had seen other more compelling documents connecting Kalejs to Arajs Kommando. These documents, if they existed at all, were not offered into evidence.

Dr. Hilberg's list of the company commanders of the Arajs Kommando, with the exception of Mr. Kalejs, came from the decision in the case of People v. Arajs in District Court of Hamburg, Germany in

1980. As mentioned, that 157 page opinion names all of the Arajs officers except Mr. Kalejs. And Mr. Arajs' German attorney, Mr. Burger, confirmed that Mr. Kalejs's name was not mentioned in the testimony or the exhibits in the Arajs trial nor, apparently, was the name of Mr. Kalejs mentioned in the various books written about the Arajs Kommando. And there appear to be no German records which name Mr. Kalejs as a member of that organization.

Again, it appears that Dr. Hilberg's opinion was based principally on absent documents and the Abols statement.[5] The University of Riga documents, which were produced, were compromised in his opinion:

"The problem I have encountered with

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[5] Indeed, Dr. Hilberg relied solely on the Abols statement to establish Mr.Kalejs' service at the Salaspils-Sauriesi concentration camps. This was hearsay on hearsay without the production of the Abols statement or evidence supporting its reliability.

materials that come from the Soviet Union is . . . I do not see the entire folder from which the document is taken. What I am missing is a context, a before and after, which would make it possible for me to better understand the contents of the document."

Mr. Kalejs could very well have been a member of the Arajs Kommando, but the evidence in this case, excluding the Soviet depositions, is inadequate in my opinion to establish that fact. So how should we evaluate the Soviet depositions?

The majority opinion gives short treatment to Mr. Kalejs' arguments about the unreliability of the Soviet witnesses and documents. It states:

> But we have relied on evidence from the Soviet Union before, see, e.g., Kairys, 783 F.2d 1374, and Kalejs has not pointed to any reason why the Soviets would want to implicate him personally, or demonstrated any unusual interest in his case by Soviet authorities. Where, as here, the Soviet evidence is corroborated by Western documentation, plus reliable eyewitness testimony subject to vigorous cross-examination, and the

> evidence is credible on its own terms, we will not discard a case against a Nazi collaborator merely because some of the evidence originated in the Soviet Union.

First, this Court has been cautious and very selective in relying upon evidence from the Soviet Union in these immigration law cases. There appear to be eleven cases involving OSI's use of Soviet depositions. These cases are:

> Matter of Laipenieks, All 937 435,(Immigration Court, San Diego 1982). Matter of Maikovskis, A8 194 566 (Immigration Court, New York, 1983). United States v. Sprogis, No. CV1804(E.D.N.Y. 1984). United States v. Koziy, 540 F.Supp. 25 (S.D. Fla. 1982). United States v. Palciauskas, 559 F.Supp. 1294 (M.D. Fla. 1983). United States v. Hutyrczky, 803 F.Supp. 1001 (D.N.J. 1992). United States v. Linnas, 527 F. Supp.426 (E.D.-N.Y. 1981), aff'd without opinion 685 F.2d 427 (2d Cir 1982). United States v. Osidach, 513 F. Supp. 51 (E.D. Pa 1981). United States v. Kairys, 600 F.Supp. 1254 (N.D.Ill. 1984), aff'd, 782 F.2d 1374 (7th Cir. 1986). United States v. Kowalchuk, 571 F.Supp. 72, E.D. Pa. 1983), 773 F.2d 488 (3rd Cir 1985). United States v. Kungys, 571 F.Supp. 1104 (N.D.N.J. 1983), 793 F.2d 516(3d Cir. 1986).

I find myself in agreement with petitioner's analysis of these cases:

Respondent reviews eleven United States cases involving use of OSI's Soviet deposition evidence in its Brief. OSI admits that the depositions were neither credited as principal inculpatory evidence nor as corroborative of other inculpatory evidence in three of those cases (R. Br., P 8). None of the other eight cases used the Soviet depositions as the principal inculpatory evidence where there was a finding against the citizen or immigrant. OSI has not taken issue with the assertion in Kalejs' Brief that:

> "The previous Seventh Circuit cases decided favorably to OSI regarding 'participation in persecution' each had the required, official German military assignments that formed the basis of the persecution counts, with photographs of those defendants attached--most displayed defendants' fingerprints." Kalejs Brief, p. 44.

No such documents were offered against Kalejs. In the eight cases OSI cites in its support, where Soviet evidence was credited at least in part, witnesses from sources other than the Soviet Union claimed personal knowledge and identified the defendants Kosiy, Palciauskas, Osidach, Kowalchuk); or defendants had admitted membership (Linnas, Palciauskas); or the documentary evidence was "conclusive" (Kairys) or depositions were limited to show killings occurred (Kungys); or in the most recent case the depositions were taken in the United States (Hutyrczky). Objection by the defense was not made in (Koziy, Hutyrczky); or the defendant did not participate in the Soviet depositions and objection was waived (Koziy, Palciauskas, Linnas); or held to be at most harmless (Palciauskas). Here the sole identification witnesses who claim personal

knowledge of Kalejs were Soviet citizens and their depositions were taken inside of and under the control of the Soviet Union. No German or Latvian military identification records were introduced relevant to alleged Arajs Kommando membership--no photo or thumbprint. Kalejs has consistently denied any service with the Arajs Kommando.

Second, the Soviet authorities had a very good reason to implicate him personally: they considered him a traitor for fighting with the Germans. And their current animus was reflected in the testimony of various Soviet witnesses that they had recently seen articles in the local Communist press about Kalejs.

Third, I am unaware how the Soviet evidence was "corroborated by Western documentation plus reliable eyewitness

testimony subject to vigorous cross-examination."

Fourth, the majority's statement that it will not discard a case against a Nazi collaborator merely because some of the evidence originated in the Soviet Union assumes the petitioner's guilt when that is precisely what is in issue.

And the statement by the majority that credits the Soviet's explanation that the reason the Soviet witnesses did not travel to the United States to testify in these proceedings, that is, because they were "too old and frail" to travel, reflects an uncritically narrow focus that borders on the naive.[6] And its statement that Kalejs

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[6] The Soviet witnesses here, without exception, served long prison terms in Soviet prisons. Their testimony by deposition was taken in the presence of the Senior Assistant Procurator of Latvian S.S.R., two of his assistants, two prosecutors of the U.S.S.R. General Procurator's Office in addition to two OSI attorneys, the defense attorney, the court reporter, the video tape operator

did not attend the taking of the Soviet depositions "because he did not ask to attend" does not adequately reflect the record on this issue and dismisses the importance of confrontation too casually.

Finally, the majority states that the accused "has not told us and we cannot even begin to imagine what Kalejs would hope to uncover by visiting the sites of atrocities committed fifty years ago." The potentials of visiting the site, in-

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and a translator. The Senior Assistant Procurator of Latvian S.S.R, one Mr. Batarage, presided. So each witness was facing the Soviet Prosecutors from the offices that had sent him to prison. The defense attorney states that no witness who is a citizen of the U.S.S.R. has ever testified in the United States in an OSI case. In People v. Arajs, District Court of Hamburg (1980) the Court observed: "It is known to the Court that witnesses in the Soviet Union generally do not receive exit visas. This, however, is not openly discussed by the Soviets, but generally bears the remark that the witness can not travel due to poor health. When Mrs. Medalje did not respond to the summons to Hamburg, but did appear for the interrogation in Riga, it became clear that the medical reasons had only been contrived. This also applies for the witnesses Lutrinsch and Kalninsch who, though ready to travel, did not appear in Hamburg." The Soviet witness in this case, Mr. Kalnins, is the same person as the Mr.Kalninsch in the Arajs case.

terviewing local survivors, reviewing old newspaper morgues, and just snooping around, are well known and understood by good lawyers and investigators.

Here we are dealing with a deportation proceeding. The statutes and regulation quoted above mandate that the alien "have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf and to cross-examine witnesses presented by the Government." Did Mr. Kalejs have such "reasonable opportunity" here? One could, by interpreting the language quoted from the regulation expansively, argue that it simply incorporates Brady v.Maryland, Washington v. Texas, and the evidentiary rules governing cross-examination. But even if one interprets the language narrowly and concludes that Mr. Kalejs had a reasonable

opportunity to examine the evidence that the government *actually chose to use against him*, it can be questioned whether he had a "reasonable opportunity to present evidence on his own behalf," considering the restrictions placed on him in relation to discovery. And, in no event can it be said that he had a "reasonable opportunity to cross-examine witnesses presented by the government," considering the same limitations on discovery (including denial of pre-deposition access to the witnesses and to their prior statements) and the locus and circumstances of the taking of the depositions, including the role of the Soviet procurator in restricting cross-examination. If the regulation does not require this conclusion, surely the Constitution does.

It is not enough for the government to

argue that it did the best it could under adverse circumstances over which it had no control. The government did have control over the prosecution of the deportation proceeding. It had to decide whether to rely on and vouch for witnesses and evidence it had no opportunity to adequately investigate. It could even, as a last resort, choose to forego proceeding against one it felt probably guilty of serious war crimes rather than risk reliance on untestable evidence and witnesses, all compromised by Soviet control.

The language of Chief Judge Aldisert in his dissent in United States v. Kowalchuk, 773 F.2d 488, 498 (3rd Cir. 1985), cert. denied, 475 U.S.1012, 106 S.Ct. 1188, 89, L. Ed.2d 303 (1986), even though dealing with a denaturalization proceeding, makes the same point:

I quickly recognize that it is always difficult to reconstruct what actually happened at any point in history, and more difficult still when the events of consequence occurred during totally devastating wartime conditions, in enemy territory, over forty years ago. Indeed, this realization lies at the core of the due process issues which I will soon discuss.

* * *

But Kowalchuk's due process claim, deemed so insignificant by the majority that they summarily dismissed it, see page 498-499, is to me so important an issue that I choose to address it first.

* * *

Although I recognize that we would normally not address the constitutional issue if an independent statutory ground supports the outcome, I feel that under these particular circumstances the constitutional violation is so compelling that it requires discussion first. Our Department of Justice required Serge Kowalchuk to defend himself against charges based on events that occurred over forty years ago in the Soviet Union. John Rogers Carroll, an experienced Philadelphia trial lawyer, represented him, but was not able to obtain, interview, or even seek witnesses in the Soviet Union. Attorney Carroll was permitted to travel to the Soviet Union, but, incredibly, was allowed to interview only those witnesses obtained and controlled by the Soviet government. Mr. Carroll, Kowalchuk's attorney, was also not permitted to visit Lubomyl, for

the purpose of either obtaining witnesses or collecting physical evidence; incredibly he was denied access to the very town where the government claims the illegal conduct of Kowalchuk took place. App. at 1689. The Soviets sowed the seeds of these proceedings by blasting away accusations against Kowalchuk in Trud, the house organ of the KGB.

When this American citizen, Kowalchuk, attempted to prepare a defense to these Soviet-instigated charges, he found the Soviet fox to be the keeper of the chicken house. Kowalchuk's contention, therefore, goes far beyond an argument that he was denied the opportunity to interview potential witnesses. Rather, it is that he was denied the opportunity to develop a meaningful defense of any type. Because I believe that the right to present witnesses and establish a defense is a fundamental element of due process of law, I also believe that revocation of Serge Kowalchuk's citizenship, under the circumstances here, constitutes a blatant violation of a very precious fundamental right.

* * *

Professor Raul Hilberg, one of the Government witnesses, acknowledged that Soviet authorities tightly control all access to all documents concerning World War II war crimes. Id. at 827-30. Additionally, testimony of the defense witnesses established that Soviet authorities routinely manipulate witnesses, especially in political trials, and that any efforts by defendant to obtain favorable evidence from Soviet citizens

would endanger those citizens' safety. Id. at 1401.

Other courts have expressed hesitancy in crediting evidence from Soviet sources. In United States v. Kungys, 571 F.Supp. 1104 (D.N.J. 1983), a case involving facts that are quite similar to those of this appeal, the court emphasized the Soviet's motivation for discrediting emigres:

> Despite Soviet conquest [of Lithuania] there remain strong nationalistic feelings and continuing allegiance by a significant portion of the population to the Roman Catholic Church. The attempts by Soviet authorities to stamp out these influences and to create the myth of historic friendship between the people of the Soviet Union and its various national groups are weakened by the presence abroad of large groups of emigres who experienced personally the effects of Soviet occupation and who help keep alive Lithuanian national and religious convictions. . .

In 1964 there was formed the Latvian Committee for Cultural Relations of Latvians abroad, and during 1970-76 Lesinskis [a Latvian member of the KGB who defected in 1978] was chairman of its presidium, receiving instructions from the KGB. Its objective was also to discredit Latvian emigres, particularly those who actively sought the end of the Soviet occupation. This was accomplished by publication of books and articles purporting to describe the war crimes and collaboration of which emigres were guilty. The facts were often embel-

lished and supplemented with forged documents, false testimony and pure invention. When he was assigned to a post in the United States, Lesinskis' job was to obtain information about Latvian communities abroad, to promote discord within them and to discredit their leaders. All of this was a KGB function.

Id. at 1124. The court concluded that:

> We are faced with a situation where the Soviet Union has a continuing, strong state interest in a finding that defendant was guilty of atrocious conduct while collaborating with German occupation forces. We also are faced with the fact that the Soviet Union uses special procedures in political cases such as this which, on occasion at least, result in false or distorted evidence in order to achieve the result which the state interest requires.

Id. at 1126.

In Kungys the district court found the government's evidence not credible and denied the government's petition to revoke Kungys's citizenship. The court rebuked the government for its use of Soviet supplied evidence:

The government elected to collaborate in

the prosecution of this case with the Soviet Union, a totalitarian state. It has accepted the assistance of Soviet authorities, particularly the testimony of witnesses who had been interrogated by Soviet investigators and from whom statements had been obtained by those interrogators.

Knowing the nature of the Soviet legal system, the government had an obligation to make every effort to ensure that the testimony it received under the auspices of the Soviet authorities was not tainted by the known Soviet practices designed to obtain the desired results in a particular case even at the expense of the truth. If the government deputizes a totalitarian state to obtain for it evidence to be used in a United States court, the government must take whatever steps are necessary to ensure that the evidence was not coerced or otherwise tainted by improper pressures.

Id. at 1131-32. See also United States v. Sprogis, 763 F.2d 115, 120-21 (2d Cir.1985); Laipenieks v. I.N.S., 750 F.2d 1427, 1435-36 (9th Cir. 1985).

Congruent with the Supreme Court's teaching in Washington, I conclude that a significant deprivation of due process occurred because the Soviet authorities controlled both the witnesses supplied to the government and Kowalchuk's access to any possible exculpatory information.

It is apparent that the only archival evidence supporting respondent's contention that Kalejs was a member of the Arajs

Kommando was provided directly or indirectly by Soviet authorities. It is obvious that those authorities had full access to the archives. They could pick and choose there from as they wished. The Soviet Union not only refused Kalejs access to archival documents and to actual and potential witnesses, but, to repeat, it also refused such access to our government.

The respondent argues that Mr. Kalejs has not demonstrated that any additional relevant archival documents exist. However, it is interesting to note that two days before oral argument in this case the government produced protocols that it had just discovered. And we know that the Soviet government has consistently lied about its own role in many of the pertinent historical events. It will be re-

called that the Soviets attempted to place responsibility on the Nazis for the massacre of the Polish officers in the Katyn Forrest. It has only recently been acknowledged that the Communist forces were responsible for that crime. The "Cold War" was still on when the depositions in this case were taken under the supervision of Soviet officials.

The OSI's reliance on, and defense of, Communist gathered evidence has frequently been brought into question, most recently in the case of Demjanjuk v.Petrovsky, 776 F.2d 571 (6th Cir.1985), cert. denied, 475 U.S. 1016, 106 S.Ct.1198, 89 L.Ed.2d 312 (1986). On June 3, 1992 the Sixth Circuit called upon the OSI to describe evidence that it had showing that Demjanjuk was not "Ivan the Terrible" and to state when they obtained that evidence. It will be re-

called that Mr. Demjanjuk had, between the 1985 extradition and the date of the Sixth Circuit order in 1992, been tried and sentenced to death in Israel. The Sixth Circuit called upon Judge Tom Wiseman, as Special Master, to take evidence and determine if there had been any fraud upon the Court. Judge Wiseman recently filed his 195 page report which essentially absolves the government attorneys of any intentional wrongdoing. Nevertheless, his findings show how both Mr.Demjanjuk and the judicial process were prejudiced by the manner in which the case was handled. He states, inter alia:

> The Soviet evidence, viewed in its entirety, casts a substantial doubt on Mr. Demjanjuk's factual guilt of the central allegation of the denaturalization complaint--that he was Ivan the Terrible of the Treblinka gaschambers. The statements of former Treblinka guards and laborers *recently obtained from the Soviet Union* constitute an harmonious chorus which inculpate a man

named Ivan Marchenko as the Ivan who worked at the gas chambers, and thus exculpate Mr. Demjanjuk from those specific crimes.

* * *

What is particularly telling about this evidence is that it provides no corroboration for the key elements of the government's theory in the denaturalization trial. For example, there are no additional witnesses naming Mr. Demjanjuk as a motorist of the gas chambers. Nor do the statements provide any support for the transfers of the sort Mr. Moscowitz hypothesized could explain the evidence. As Mr. Parker observed, the evidence in 1980 suggested that there were two roads, one leading toward the Treblinka gas chambers, the other toward Treblinka. The road to the Treblinka gas chambers is not developed at all by the new Soviet evidence, and the evidence's silence on the question of his presence at the gas chambers speaks loudest of all. (Emphasis added)

Other comments of Judge Wiseman bear repeating:

Ultimately, this is a case about questions that were never asked, and questions asked that went unanswered. Government attorneys failed to ask questions regarding the evidence they possessed, and this error prevented them from asking questions designed to obtain additional evidence.

Government attorneys failed to challenge the evidence they possessed, and

this led them to abandon leads which contradicted their interpretation of the evidence.

* * *

Thus, the government was inadequately skeptical of this theory to begin with, and this shortcoming was compounded by the unintended silencing of the lone dissenting voice--Mr. Parker's. If Mr. Ryan and Mr. Moscowitz had received and read his February 26, 1980 memorandum, the latent suspicions about the case may have been resolved in the light of day. Mr. Parker had believed that they understood the gravity of his feelings about the case, and this misunderstanding eventually resulted in his resignation.

In specific terms, the prosecutors never attempted to prove the null hypothesis--an alternative hypothesis which is the converse of that in which one believes. In the Demjanjuk case, attempting to prove the null hypothesis would have led the government investigators and attorneys to look for evidence that someone other than John Demjanjuk was Ivan the Terrible. Ironically, Allan Ryan, Jr., described this process in his book *Quiet Neighbors*, in describing the reinvestigation of the case of Frank Walus:

> 'My aim was to follow two distinct lines of investigation: first, to reexamine the existing evidence, both the prosecution and defense; second, to search for any new evidence that would shed light on the truth.'

In addition, the case is about questions asked that went unanswered. As I have discussed above, a careful reading

of Mr. Demjanjuk's discovery requests demonstrates that he asked for virtually every piece of evidence that is at issue in these proceedings. As demonstrated, the government did not provide the evidence because it believed that it was under no duty to do so. The heart of the discovery problems, therefore, was a tragic misunderstanding."

These difficulties were only compounded, however, by the attitude the trial attorneys took toward discovery; an attitude that at times bordered on gamesmanship.[7]

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[7] Using the null hypothesis here, one would first examine Mr. Kalejs' own story of his life during the years 1941-1944. That story may not be true, but it *could* be, and portions of it are supported by other evidence. Briefly the explanation given by Mr. Kalejs at trial and in his pre-charge statement (when he was unrepresented by counsel) is summarized in his Reply Brief as follows:

> Kalejs consistently denied membership in Arajs Kommando first in his precharge unrepresented sworn statement and at trial (v. 5, 1953). Kalejs returned to Riga after the Soviet invasion and after his desertion from the Soviet Army. As required, he registered as a former Latvia Army officer in Riga (2001, 1964) He wanted to attend the University of Riga (1888). He needed to obtain certificates to vouch for service against the Soviets (1983). He obtained such certificates from a friend (1890, 1985). These were submitted to the University and he gained admission (1889). He studied there for one semester in the fall of 1941. In early 1942 he was then called to service in a Latvian ski company (1969). He developed ulcers (1903) and returned to Riga in 1942 and was hospitalized (1990). After he was released as unfit for duty he returned to his University studies (1904) until near the end of the war when he joined the Latvian Legion(1907). During school vacation

There is nothing to suggest that the intramural problems that beset the prose-

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periods, he performed farm labor for friends he had met away from Riga (1904, 1981). His testimony was corroborated. Burger testified Arajs told him that the Arajs Kommando often prepared false certificates for Latvians since the Germans would make little effort to be of assistance to Latvians (v. 5, 1784,5). Mrs. Namguads and her daughter, Mrs.Kula, testified he had lived with them prior to the Soviet invasion (v. 5, 1796,1848). He then left. He returned later sick with ulcers (v. 5, 1799), 1854) and worked on their farm and neighboring farms from time to time during the war (v.5, 1797, 1850). Mr. Olins testified he saw and spoke to Kalejs in Riga in late 1942 (v. 5, 1865) and Kalejs was ill with stomach problems (v. 5, 1866).

Of course there are many good reasons to be skeptical. The majority opinion, for instance, asks:

> He does not explain, for example, how he so easily obtained affidavits identifying him as not merely a member but an officer of the Arajs Kommando, or why he didn't simply obtain a certificate from the unit he claimed to be a member of. It is also incredible that the Germans would have continued to pay the military salary of a Latvian soldier for two-and-a-half years while he was recuperating from an ulcer, studying and laboring on a farm. Kalejs claims to have had no knowledge of the mass executions of Jews outside Riga, but according to expert testimony the subject had set the town abuzz at the time. And Kalejs admitted to [service] under a general who was head of the Einsatzgruppe, the mobile killing unit, in Latvia, although he later tried to distance himself from this testimony.

What is needed is a new proceeding and new trial in which all reasonably available relevant evidence is brought forth, to the end that the truth may be uncovered.

cution in the Demjanjuk case in any way affected this case. But the attitude of the government toward the due process rights of the respondent here, particularly with respect to discovery, appear similar to those of the government in its dealings with Mr. Demjanjuk. So Demjanjuk is cited to emphasize the hazards that exist in any proceeding where the evidence is controlled by unreliable third parties, the prosecution is not sensitive to the charged party's rights, *and* judicial quality due process standards for discovery, the admission of evidence, the conduct of depositions, and cross-examination of witnesses are not adequately recognized and enforced.

I urge a straightforward recognition that, either under 8 C.F.R. § 242.16(1988) or the United States Constitution, or

both, aliens in deportation cases such as this are entitled to discovery just as other civil litigants in our United States District Courts. And certainly the government should be required to disclose any exculpatory evidence of which it has knowledge. See Judge Tom Wiseman's discussion of Brady in his report in Demjanjuk. The right of cross-examination is trivialized if the alien does not have fair and reasonable access to potential witnesses, documentary evidence and site investigation. What is fair and reasonable in any case will depend on the circumstances, but complete stonewalling, whether by our government or by another government, will require that evidence tainted by such restrictions be disregarded. The government states in its brief:

> Where, as here, the government states that to its knowledge the only extant

> statements are those it has turned over to Kalejs, immigration law imposes no duty on the court or the government to determine whether other statements may exist merely because Kalejs' attorney so alleges.

But an absolute cut-off of access to potentially relevant prior statements of any deponent known to exist should bar the use of such deponent's testimony. Here the government was aware by virtue of the Soviet deponents' testimony that prior statements were made and that a report or transcript thereof possibly still existed. The government did not have to rely merely on Mr. Kalejs' attorney's allegations; it heard the witnesses describe such prior statements.

The government also states that Mr. Kalejs had some independent source of certain prior statements made by some of the Soviet witnesses so it observes, "It is open to question whether Kalejs is

actually missing *any* prior protocols or, if any are missing, whether they are material." Exactly! No one knows, *except* the Soviet authorities. The petitioner does not know. The government does not know. Only the Soviet authorities know or can find out, absent access to the archives by our government and/ or the petitioner.

Each of the charges that resulted in findings against Mr. Kalejs depend upon proof that he was a member of the Arajs Kommando. It is my opinion that the record does not contain enough substantial competent evidence to meet the clear and convincing standard on this key factual issue. I further conclude that the consequence of this decision undercuts the government's contention that Mr.Kalejs made a materially false statement on his Visa application. I therefore conclude

that the deportation order can not be affirmed on this record.[8] However, I do not believe that the record requires us to dismiss the entire proceeding. Rather it is my opinion that a new trial should be ordered consistent with the view expressed herein.

Conditions in Russia and Latvia have

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[8] I have stated that it is my opinion that this record, absent the tainted evidence, would not sustain a factual conclusion that Mr. Kalejs was a member of the Arajs Kommando or assisted in persecution. But what if I believed the non-tainted evidence would suffice for that purpose?

The suggestion that we should affirm if we determine that the competent, non-Soviet, evidence would be sufficient to sustain the decisions of the IJ and the BIA raises an additional question in a deportation case such as this where administrative discretion is broad: *Would* the IJ or the BIA have determined that Mr. Kalejs was a member of the Arajs Kommando and assisted in persecution in the absence of the tainted evidence? One hesitates to assume that, if they *could* have so found on the competent evidence, they necessarily *would* have so found. This same type of inquiry is pertinent to the visa misrepresentation issue: If the competent evidence would permit the finding that Mr. Kalejs made a willful false statement as to a material matter not related to his membership in the Arajs Kommando, can we assume that such a finding would have been made? Indeed one may question whether any deportation proceeding against Mr. Kalejs would have been initiated absent the belief that Mr. Kalejs had assisted in persecution.

changed dramatically in the last two years. If a new trial is held, who knows what may happen?

Perhaps, indeed probably, the Latvian and Russian authorities will now allow direct, private, access to the witnesses, to the archives, and to site investigations. If so, the government would have then, for the first time, the opportunity to carefully evaluate its case in the light of any evidence that this new access might provide. It would then know which Soviet witnesses to vouch for and which not to vouch for, and which documents exist that support or weaken Mr. Kalejs' testimony concerning his life between July 1941 and 1944.

Of course, it is possible that this new access would produce no new documentary evidence, either because it never existed,

was lost or destroyed over the years, or because the departing Communists officials took or destroyed such evidence. Reality will have to be dealt with.

Still, any decision based upon all of the available relevant evidence will enjoy much more credibility than the decision we now examine.

I therefore respectfully dissent.

A true Copy:

Teste: _____

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

Office of the Immigration Judge

File: All 655 361 - Chicago

In the Matter of	)	
	)	IN DEPORTATION
Konrads KALEJS	)	PROCEEDING UNDER
	)	SECTION 242 OF
	)	IMMIGRATION AND
	)	NATIONALITY ACT
Respondent	)	

CHARGES 1. Section 241(a)(1) of the Immigration and Nationality Act of 1952 as amended [8 U.S.C. section 1251(a)(1)] -- Excludable at entry under section 212(a)(19) of the Act [8 U.S.C. section 1182(a)(19)] as an alien who sought to and did procure a visa or other docu-

mentation, or sought to and did enter the United States by Fraud, or by willfully misrepresenting material facts.

II. Section 241(a)(1) of the Immigration and Nationality Act of 1952 as amended [8 U.S.C. section 1251(a)(1)] -- Excludable at entry as an alien who sought to and did procure a visa or other documentation, or sought to and did enter the United States, by fraud, or by willfully misrepresenting material facts, and therefore was not in possession of a valid unexpired immigrant visa under section

212(a)(20) of the Act [8 U.S.C. section 1182(a)(20)]

III. Section 241(a)(2) of the Immigration and Nationality Act of 1952 as amended [8 U.S.C. section 1251(a)(2)] -- Excludable at entry as an alien who sought to and did procure a visa or other documentation, or sought to and did enter the United States, by fraud, or by willfully misrepresenting material facts, and therefore is in the United States in violation of section 212(a)(19) of the Act [8 U.S.C. section 1182(a)(19)]

IV. Section 241(a)(2) of the Immigration and Nationality Act of 1952 as amended [8 U.S.C. section 1251(a)(2)] -- Excludable

at entry as an alien not in possession of a valid unexpired immigrant visa and therefore is in the United States in violation of section 212(a)(20) of the Act [8 U.S.C. section 1182-(a)(20)]

V. Section 241(a)(19) of the Immigration and Nationality Act of 1952 as amended [8 U.S.C. section 1251(a)(19)] -- Deportable as an alien who ordered, incited, assisted, or otherwise participated in the persecution of persons because of race, religion, national origin, or political opinion between March 23, 1933 and May 8, 1945, under the

direction of or in association with the Nazi government of Germany or a government in an area occupied by the military forces of the Nazi government Germany.

APPLICATIONS: Termination of proceedings, and in the alternative application for all available forms of relief (deemed pretermitted by the Immigration Judge (Tr. 1363)

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DECISION OF THE IMMIGRATION JUDGE

The respondent is a 75-year-old male, a citizen of Australia, who was admitted to the United States for permanent residence on February 6, 1959. On October 29, 1984, an Order to Show cause was issued against the respondent pursuant to Section 242 of the Immigration and Nationality Act of 1952, as amended [hereinafter, the Act] (Ex.1). An amended Order to Show Cause dated March 18, 1988, was served on the respondent's attorney by express mail on March 22, 1988 (Ex. 15). In this amended

Order the Government alleges that the respondent is deportable under the five above-captioned charges of the Act.

I. Allegations

The first six allegations in the amended Order to Show Cause state that the respondent is a native of Latvia and citizen of Australia who resided primarily in Latvia between 1941 and 1944, during the German occupation of Latvia, and that he was admitted to the United States for permanent residence on February 6, 1959, based on presentation of an Immigrant Visa and Alien Registration card issued on December 3, 1958, by the American Consulate General in Melbourne, Australia.

Allegations 7 thru 25 of the amended Order to Show Cause can be grouped into four lines of inquiry: Respondent's membership is an anti-Soviet self-defense

unit; the existence of the Nazi-subordinated "Arajs Kommando"; Respondent's membership and activities in the Arajs Kommando; and Respondent's alleged misrepresentations to obtain a visa.

A. Respondent's Membership in an Anti-Soviet Self-Defense Unit

Allegations 7 and 8 state that in June and July of the 1941 the respondent was a member and organizer of a "Self Defense Unit" in Litene, Latvia, where he assisted and participated in the persecution of persons on the basis of their political opinions.

B. Arajs Kommando

Allegations 9 thru 14, and 17, state that a Kommando unit known inter alia as the "Latvian Security Auxiliary Police" was organized during the early months of the German occupation by Viktors Arajs in

Riga, Latvia; that the Latvian Security Auxiliary Police, or "Arajs Kommando," was organized with approval of the Nazi authorities and acted in association with the subordinate to the German Security Police and SD under the regional direction of German SS General Walter Stahlecker; that the SD, SS, and parts of the Security Police were declared to be criminal organizations by the International Military Tribunal at Nuremberg, Germany; that the occupying Nazi authorities used the Arajs Kommando to aid in the persecution and murder of those persons considered to be racially undesirable or enemies of Nazi Germany; and that the Arajs Kommando murdered thousands of Jewish men, women and children in the forests surrounding Riga.

C. Respondent's Alleged Membership and Activities in the Arajs Kommando

Allegations 15 thru 21 state that the respondent joined the Arajs Kommando on July 29 or 30, 1941; that the respondent served as a member, First Lieutenant, and Company Commander in the Arajs Kommando; that the respondent was stationed in Riga from on or about July 29, 1941, to January 1942 during which time the Arajs Kommando murdered thousands of Jewish men, women and children in the forests surrounding Riga; that during the period January 1942 to December 1944, the respondent served as a Company Commander of the Arajs Kommando, subordinate to the Commander of the Security Police and SD; that during the period July 1941 to December 1944, the respondent served as commander of an Arajs Kommando guard unit in concentration camps in the Ostland; that during the period July 1941 to December 1944, the respondent assisted or participated in the shooting of civil-

ians, including Gypsies, and in the destruction of at least one village; and that as a member of the Arajs Kommando and Security Police the respondent assisted or participated in the persecution of persons because of race, religion, national origin, or political opinion, under the direction of or in association with the Nazi government of Germany or a government in an area occupied by the Military forces of the Nazi government of Germany.

D. Visa Application and Interview

Allegations 23-24 of the Order to Show Cause state that the respondent failed to reveal his association with the Arajs Kommando when obtaining his immigration visa to the United States and therefore wilfully misrepresented material facts. The Order further states in allegation 25 that on March 1, 1984, the respondent,

under oath, admitted to U.S. officials for the first time that he had served as a company commander of a police unit directly subordinate to General Stahlecker; that he served in the 15th SS Grenadier Division of the Latvian Legion (see allegation 22); and that he had misrepresented and concealed these facts when he applied for a visa to enter the United States.

II. Deportation Hearing

Hearings in this matter were held before the undersigned on April 4-5, 19-21, 25, May 24, and August 1-3, 1988. The respondent exercised his Fifth Amendment right against compulsory self-incrimination when called by the Government to testify. However, in rebuttal he chose to testify in his own behalf and was cross-examined. Witness testimony and documentary evidence was offered by both parties. Included in

the evidence are video cassettes and corrected transcripts recording the testimony of 13 witnesses deposed in Latvia. These depositions were conducted in Latvia under the supervision of the Soviet Government, and the attorneys for both parties concerned here were present. I granted prior permission to conduct these depositions, I have viewed the results, and I find these depositions admissible as probative and not inherently untrustworthy. See United States v. Osidach, 513 F. Supp. 51 (E.D. Pa. 1981); United States v. Kairys, 600 F. Supp. 1254 (N.D. Ill. 1984), aff'd, 782 F.2d 1374 (7th Cir. 1985), cert. denied, 476 U.S. 1153 (1986). See Ex. 103 and 104. The weight accorded to the testimony of each deponent has been judged individually and is reflected below.

Key Government Witness

The case presented by the Government at the respondent's deportation hearing with respect to the 241(a)(19) charge was based in large part on the testimony of historical expert Dr. Raul Hilberg, three survivors of war atrocities in Latvia, the deposition witnesses, and admissions made by the respondent in transcribed interview conducted under oath by Justice Department investigator Jeffrey Mausner on March 1, 1984. The following is a selective distillation of the key witnesses' testimony.

A. Dr. Raul Hilberg[1]

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[1] Dr. Hilberg was qualified as an expert witness in these proceedings. He is a professor of political science at the University of Vermont where his primary field of academic study is the Holocaust. A detailed description of Professor Hilberg's qualifications is set forth in the Government's Post-Trial Brief at 4-6. I note in particular that Professor Hilberg previously has been qualified as an expert on the Holocaust in deportation cases before the Immigration Court and deportation and denaturalization cases before District Courts of Appeals. See cases cited at Government's Post-Trial Brief at 4 n.1.

Dr. Hilberg testified that the armed forces of Nazi Germany invaded Latvia in June of 1941 (Tr. 96, 97). Within the first few days of the invasion an organization consisting of Latvians and officially known as Latvian Auxiliary Security Police was formed under the direction of the German forces. Latvian Major Viktors Arajs was placed in command of the Latvian Auxiliary Security Police which commonly became known as the "Arajs Kommando" (Tr. 138, 166-81). The Arajs Kommando was a division of the German Security Police for Latvia (Einsatzkommando 2) which was in turn a division of the German Einsatzgruppe A for the Ostland region. German Dr. Ruldolf Lange was a commander for the Einsatzkommando 2; German General Walter Stahlecker was the initial commander for the Einsatzgruppe A (Tr. 105-11, 128-29, 164, 165). Dr. Hilberg testified that the

Arajs Kommando was headquartered in Riga and its task was to assist the Germans in carrying out acts of persecution against Jews, Communists and Gypsies as part of the Nazi program to annihilate these groups (TR. 97, 98, 104-07, 136, 137, 144-46, 148, 227-28). Dr. Hilberg stated that membership in the Arajs Kommando was initially 50-60, totalled about 100 by August 1941, grew to approximately 300 by the end of 1941, and included at least 700 members during 1942 and 1943 (Tr. 158-63). He noted that volunteers would not have been confused as to the purpose of the Arajs Kommando, or to the requirement that all members participate in the persecutions (Tr. 154-58, 185-87, 227-28).

Members of the Arajs Kommando assisted in the execution of civilians in and around Riga and at other villages within

Latvia, particularly on the Latvian eastern front, where villages were burned and their civilians killed as part of "anti-partisan" activity (Tr. 267-73). They participated in the SS-organized mass killing of thousands of Latvian Jews who had been confined in a section of Riga known as the Riga Ghetto (Tr. 1890-90, 194-95, 227-28).

Arajs Kommando members served as guards at the concentration camp at Salaspils outside of Riga (Tr. 145-46). Dr. Hilberg testified that the inmate population at the Salaspils camp contained from 1000 to 1800 Jews at any one time between December 1941 and the summer of 1942 (Tr. 233-40). Many of these Jews had been transported by the German army from Europe by train (Tr. 233). After the summer of 1942 most of the Jewish population was moved to the

Riqa ghetto and the camp thereafter was comprised mainly of political and criminal prisoners. The Jews at the camp wore a yellow star on their clothing and had separate barracks from other prisoners (Tr. 241-43). Beginning in December of 1941 the camp was built by the prisoners to include eighteen barracks by the summer of 1942, a double barbed-wired exterior fence, guard towers, and search lights (Tr. 234-35). The camp was under the overall command of Gestapo officer Kurt Krause. Arajs Kommando members were assigned as perimeter guards under the command of a Arajs Kommando guard company commander (Tr. 237-39). Dr. Hilberg gave detailed descriptions of the severe conditions under which the prisoners of Salaspils were forced to live and work (Tr. 235ff). Many prisoners died from starvation, exposure, overwork and disease (Tr.

235, 255). Others were beaten or murdered directly by camp guards, including some by public hangings in the camp (Tr. 235-36, 255-57).

B. Alfred Winter, Kurt Servos and Ernest Ilberg

Alfred Winter and Kurt Servos testified that they were deported from Germany to Riga, Latvia, in December of 1941 because they were Jews. Ernest Ilberg stated that he was deported from Germany to Riga in January of 1942 (Tr. 423-24, 491-92). All three testified that they were confined in the Riga Ghetto and at the Salaspils camp at various times. Each confirmed that testimony of Dr. Hilberg regarding the horrible conditions at the Salaspils camp. Alfred Winter stated that he was imprisoned at Salaspils concentration camp from December 22, 1941, until mid-July 1942,

with the exception of a 12-day transfer to the Riga Ghetto (Tr. 432-34). At this time two barracks had been built by the prisoners and they were working on more (Tr. 434-35). 500 prisoners were housed in each barracks with minimal bedding, meager rations of food, only what clothing they were permitted to keep from what they brought, and lack of sanitary facilities (Tr. 435-42). Alfred Winter testified that he was assigned to burial duty, collecting bodies from the barracks and lying them in an open field until mass graves could be prepared (Tr. 444-53). Later he was assigned to be a corpsman at a sawmill outside the camp and often treated persons who had been beaten (Tr. 468-70). He testified that he was guarded in this capacity by Latvian guards. He stated that he witnessed about one hundred executions by hanging or shooting, and several

random killings (Tr. 543, 462-65). Most of these executions were carried out by members of the Latvian guard under the supervision of the Germans (Tr. 454). On one occasion Alfred Winter was beaten by Nickel, the camp commandant (Tr. 468-70).

Kurt Servos was imprisoned at Salaspils from the end of December 1941 thru the end of May or the beginning of June 1942, and again from the end of June or beginning of July thru early September 1942 (Tr. 491-98, 503). Kurt Servos confirmed that overcrowded living conditions, hard labor, inadequate food, and deaths by malnutrition and disease cited in the testimony of Alfred Winter. Kurt Servos stated that every morning corpses were brought from the barracks, and that perhaps 40% of the prisoners died in the first four months that Kurt Servos spent at the camp (Tr.

505-09). He stated that the camp was guarded by armed Latvian SS men who were supervised by German officers. The guards carried out executions and stood guard at the work sites (Tr. 509-10). Kurt Servos testified that he witnessed several random killings by Dr. Lange on visits to the camp. He also witnessed the execution by hanging of five prisoners who had attempted to escape (TR. 512-15). Kurt Servos was assigned to work in the sawmills and to unload personal baggage belonging to new arrivals at the camp. He stated that from the names on the baggage he could tell that it had belong to German Jews (Tr. 515-17).

Ernest Ilberg was confined in Salaspils from February of 1942 to mid-August 1942 (Tr. 550). He confirmed the poor conditions of the camp and that the prisoners

were guarded by armed Latvian SS men under the command of German SS men (Tr. 550-54). Jews, political prisoners and Latvian women were among the prisoners at Salaspils (Tr. 560). Ernest Ilberg testified that near to the Salaspils camp was a Soviet prisoner-of-war camp (Tr. 560-61). Ernest Ilberg was assigned to forced labor at the sawmill and then later to a barracks within the camp where he sorted and cleaned possessions that had been confiscated from the inmates on arrival (Tr. 554-58). Ernest Ilberg testified that he witnessed public hangings at the camp, and he stressed that the prison population was forced to line up and view the executions. Most of the camp deaths, however, were from starvation or disease. Ernest Ilberg stated that when he left Salaspils in August of 1942, at least some Jews and the Latvian Women prisoners remained there

(Tr. 653).

C. Government Deposition Witness[2]

Rudolfs Soms (Ex. 81CT, 9-14-87)

Rudolfs Soms joined the Arajs Kommando in February 1942 and served in the organization until 1944 (18). Shortly after joining he was sent from Riga to Zabolotye, near Nasva, on Latvia's eastern front, as a private in a platoon commanded by Indans. Rudolfs Soms testified that Indans was subordinate to company commander First Lieutenant Kalejs (19-20, 25, 36). Kalejs was in turn responsible to Viktors Arajs, and Kalejs' unit was part of the Arajs Kommando (19-20, 99). The Arajs Kommando was a division of the German SD, and Viktors Arajs reported to

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[2] For all depositions the page cites in parentheses refer to the page(s) of the Exhibit listed in the caption behind the name of the deponent.

German officer Dr. Lange, who reported to Kaltenbruenner (21, 37). Rudolfs Soms testified that his platoon was stationed in Zabolotye, and that Kalejs was stationed in Nasva. Rudolfs Soms stated he was told that Kalejs was the company commander upon arrival.

At the front, Rudolfs Soms engaged in two battles, the first near Zabolotye (6-8 Kilometers from Nasva), and the second, about one month later, at the village of Sanniki (about 20 Kilometers from Zaboltye). Rudolfs Soms testified that Kalejs participated in each battle, although he only saw Kalejs from a distance and did not have personal contact with him at these actions (8, 13, 60).

Rudolfs Soms testified that the first battle his platoon was assigned to the outskirts of the village to guard against

potential escapees. Rudolfs Soms did not see any of the inhabitants of the village and none attempted to escape. While Rudolfs Soms' platoon remained outside the village, Kalejs' unit entered. Rudolfs Soms saw the village houses and a church spire burning. He stated he believes the church spire had been used as an observation tower. Rudolfs Soms stated that later he learned from his commander and from members of Kalejs' unit, that the inhabitants of the village, who were Gypsies, had been exterminated and the entire village burned (10, 27, 29, 97-100).

German General Stahlecker commanded the attack against Sanniki, which involved Latvian, German Estonian Units. Rudolfs Soms testified that Stahlecker had received information that Sanniki contained a headquarters for Soviet military units

and had to be destroyed (97). Similar to the first battle, Rudolfs Soms' unit remained 1 to 1 1/2 kilometers from the village. Rudolfs Soms testified that Kalejs' ski patrol company broke into the village, and shooting and return machine-gun and rifle fire could be heard. On cross-examination, Rudolfs Soms stated that 9 men in his platoon were killed and many wounded.

General Stahlecker was among those wounded. Rudolfs Soms testified he believes that in revenge for the wounding of Stahlecker, who died being transported from the battle, the village was burned down and the inhabitants in the central village annihilated (12, 97). Some civilians resisted and died in battle, others escaped the central village and remained alive (97). Rudolfs Soms stated he later

heard that an order to level the village and kill the remaining inhabitants had been issued, but he does not know who gave the order (30).

Karlis Strazds (Ex. 83CT, 9-15-87)

Karlis Strazds voluntarily joint the Auxiliary Police of the SD at the end of February 1942. From February thru April he served as an Arajs Kommando guard in Leipaja (73-83), and from the end of April thru June as an Arajs Kommando guard in Minsk (84). In July 1942 he was sent to the Fuerstenberg Police School in Germany. When he returned to Riga from Fuerstenberg in November 1942 he was sent to the Salaspils camp. At Salaspils Karlis Strazds served for approximately one week as an exterior camp guard. Karlis Strazds testified that First Lieutenant Kalejs was the company commander of the guard unit at

Salaspils, and that the guard company was a unit of the Arajs Kommando (9-11). Both Karlis Strazds' and Kalejs' uniforms were marked SD on the sleeve (23, 141). The Arajs Kommando was in turn responsible to Lange, the chief of the German SD (39). Karlis Strazds indicated that Kalejs was already present at the camp when Karlis Strazds arrived, and he estimated that Kalejs commanded 3 platoons totalling 100-120 men (20, 32). Kalejs gave the orders as to who went on guard duty. His orders were carried out by the platoon leader and top sergeant (31). Karlis Strazds' platoon leader was named Lacias (32).

Karlis Strazds stated that during his week at Salaspils he was stationed as a guard along the exterior fence which surrounded the entire camp. He was armed with a German rifle (24) and had orders to

shoot any prisoner attempting to escape from the camp (27). Karlis Strazds recalled that at the time he was present at Salaspils there were approximately 7-8 thousand prisoners housed in 15-20 barracks. The prisoners were mainly political, including soviet activists and Jews (24-25). The Jews were housed in a separate barracks and were required to wear a star on their clothing (30). Karlis Strazds recalled that both men and women prisoners were present at the camp. He stated that he believes there were no children at the camp during the time he was a guard. The external guards were not permitted to have contact with the prisoners. This was left to a system of internal guards who were commanded by Viduss (39). The internal guards carried truncheons and beat the prisoners (39).

In December 1942 Karlis Strazds was sent to Sauriesi where there was a second concentration camp located near a quarry. Karlis Strazds testified that he was appointed chief of the sixteen guards at Sauriesi by Kalejs. Kalejs personally traveled to the Sauriesi camp to install Karlis Strazds as chief of the guards, and he returned to visit the camp weekly (40, 42, 131). Karlis Strazds described the Sauriesi camp as smaller and more tolerable for the prisoners than Salaspils. The camp housed 300 Latvian male prisoners, suspected activists, in two barracks. Karlis Strazds stated that there were no Jewish prisoners at Sauriesi (36). The prisoners worked in a quarry.

In June 1943 the Kalejs company, including Karlis Strazds and Kalejs were sent to Porkhov. The company consisted of 3 pla-

toons of 40 members each plus 10 persons who performed cooking, supply, and medical functions (44). In Porkhov, the company guarded another prisoner camp located in the village of Krasnaya Beryozka and also searched for partisans in the surrounding area (11, 48). Karlis Strazds testified that Kalejs decided which platoon would remain to guard the prisoners and who would go out to search for partisans (48). Kalejs received his orders from the German SD chief in Porkhov (47). The majority of the 200 prisoners at the Porkhov camp were Latvian Jews who were required to work on a farm (49, 102).

Karlis Strazds recalled one incident where shootings took place in Porkhov. He testified that on this occasion 20-30 Gypsies were brought by truck to a pit, or bomb crater, about 2-3 kilometers outside

Krasnaya Beryozka, where they were shot and buried in the pit. Karlis Strazds testified that Germans did all the shooting while Lacias' platoon, including Karlis Strazds, was ordered to guard the surrounding area to keep curious villagers away, watch for escape attempts, and bury the victims. Initially karlis Strazds stated that Kalejs had ordered the platoon to stand guard, later he clarified that he did not know who had given the order to the platoon. Karlis Strazds testified that Kalejs was not present at the shootings (12-13, 50-53).

In August of 1943 the Kalejs company, including Karlis Strazds and Kalejs, returned to Riga where they were reorganized into units again under the command of Kalejs. The company was then sent to Skaune to guard the border and search for

Soviet partisans (13, 59). Only one skirmish with partisans occurred during this time. At this incident a woman was taken prisoner by Kalejs and the rest of the officers and was forced to serve as a charwoman. Karlis Strazds stated that this woman managed to escape in October 1943 (14, 60). The company did not meet any civilians, as the villagers had already fled the area (66). In November 1943 the company and various German divisions met with regular Soviet army troops near the town of Nevel (14). On December 23, 1943, they were attacked by the Soviet army. Karlis Strazds testified that Kalejs was present with the company up to the day of this attack when he fell ill and left the front line (14, 67). Karlis Strazds remained at the front line until mid-February 1944, when he returned to Riga (67).

Karlis Strazds testified that he last saw Kalejs in June or July 1944 at Arajs Kommando headquarters in Riga where Kalejs congratulated him on receiving an "iron cross" decoration (15, 68, 144).

Alfred Putnins (Ex. 84CT, 9-17-87)

Kalejs is the brother of Alfred Putnins' former wife, Vilhelmine Olga Kalejs. Alfred Putnins testified that he first met Kalejs in the summer of 1940. In March of 1942 Alfred Putnins and Vilhelmine Olga Kalejs were married. Alfred Putnins stated that Kalejs wore the uniform of a First Lieutenant of the Latvian Army. Alfred Putnins stated that his former wife lived with Kalejs and her parents in an apartment in Riga, and that the family also had as summer home. When Alfred Putnins came to Riga on leave form military service at the end of 1943, and in spring 1944, he

did not meet up with Kalejs. Alfred Putnins testified that his recollection, no certificate showing military service was required to enter the Riga University, at least if one was already enrolled (30). Alfred Putnins was presented with a prior statement he made to Soviet officials on July 24, 1985. He disagreed with one sentence on this Protocol by stating that he did not have personal knowledge that Kalejs was in the Arajs Kommando, only that his wife had said that others said that Kalejs was a member of the Arajas Kommando (48). The evidence reflects that Alfred Putnins may have last seen Kalejs in Latvia in Kalejs' apartment in 1944 (51, 59).

Rolands Bahsteins (Ex. 89Ct, 9-19-87)

Rolands Bahsteins served as a clerk/secretary/interpreter for Kalejs at

the Salaspils concentration came from the beginning of 1943 until autumn of that year when he deserted (8-9). He stated that Kalejs was the commander of the guard company at Salaspils. The Kalejs company was part of the Latvian SD and was headed by Viktors Arajs (8, 13). Rolands Bahsteins testified that he worked in the same building as Kalejs, in an adjoining room, that he saw Kalejs at least once every day, and that one of this tasks was to interpret for Kalejs who did not speak German (15, 20, 33). Rolands Bahsteins carried a rifle. His and Kalejs' uniforms were marked with SD epaulets (14).

Rolands Bahsteins described Salaspils as a concentration camp for political and criminal prisoners. The camp was a large field surrounded by barbed wire with watchtowers in each corner and barracks

for the prisoners. Rolands Bahsteins testified that it seemed to him there were on Jews at the Camp, and he did not recall seeing prisoners marked with the Star of David (15-16). He did not remember any hangings that took place at the camp (37). The purpose of the Kalejs company guards was to guard the prisoners at the camp and on work details (9, 19). The Kalejs guards were stationed outside the perimeter fence and they were forbidden to have contact with the prisoners inside the camp (54-56). Rolands Bahsteins gave conflicting testimony as to whether there was an internal guard at Salaspils led by Viduss, and also whether there were German guards at the camp (20-22, 29, 46). Rolands Bahsteins also believes that the Kalejs guard company guarded the camp at Sauriesi (29). Rolands Bahsteins did not recognize what the Government purports to be Kalejs'

signature on an application to the University of Riga, 15 May 1943 (Government's Dep. Ex. 5) (34-36). When confronted with a protocol signed by Rolands Bahsteins in 1986, he stated that Germans gave orders to Kalejs was one of the first to join the SD in 1941 (47). On cross-examination Rolands Bahsteins stated that he had read in a newspaper that Kalejs was a war criminal who was living in the United States (48).

Viktors Ennitis (Ex. 90CT, 9-21-87

Viktors Ennitis was appointed a guard at the Sauriesi camp in July 1942 where he served for approximately two weeks under one Lieutenant Berzins (8-9). There were at most 150 prisoners at Sauriesi during his tour of duty (48). He then transferred to the guard company at Salaspils where he served until being transferred to

the front on December 16, 1942 (9, 14). Viktors Ennitis testified that Lieutenant Kalejs was the commander of the guard company at Salaspils, and that the guard unit he had served in at Sauriesi was a detail of the Kalejs company (14, 42). Kalejs was subordinate to Viktors Arajs who reported to Dr. Lange (15). The Kalejs company guards had no contact with prisoners aside from escorting them to work places outside the camp (9). The inmates were Jews and political prisoners (23). Viktors Ennitis stated that Kalejs distributed guard duties through his subordinates (10, 18, 20). Viktors Ennitis was assigned to guard duty in the perimeter watchtowers and also as an escort to 22 prisoners assigned to dig up tree stumps outside the camp (9, 15). He carried a rifle and had orders indirectly from kalejs to fire one warning shot, and

then shoot to kill, if anyone tried to escape (16-18).

Victor Ennitis testified that during the time he was at the camp Viduss was installed as head of the internal guards. According to Viktors Ennitis, Viduss was a Latvian of lower rank than Kalejs, but he did not report to Kalejs. Viduss was responsible only to German officers, and the internal guards did not mix with the external Kalejs guards. Among the Germans involved at the camp were Lange, Krause, camp commandant Nickel, and Teckemeier (31-41).

Viktors Ennitis stated that he witnessed the hanging of two Jews on the gallows at the camp under the supervision of Lange and Krause who forced another Jew to serve as executioner (29). He stated that other prisoners were made to watch, and that

Kalejs was also present at this execution (29-30). He also indicated that members of the Kalejs guard company participated in treating the prisoners brutally by making them do exercises to the point of exhaustion (66).

Karlis Rozkalns (Ex. 92CT, 9-22-87)

Karlis Rozkalns joined the Arajs Kommando in December 1941 at the headquarters on Valdemara Street (8, 28). He testified that he was a camp guard at Salaspils in January to early February 1942. He initially stated that Kalejs was the company commander of the Salaspils guard unit (8, 22), then he withdrew his statement concerning Kalejs' presence at Salaspils (70-71).

In February 1942 Karlis Rozkalns was sent to Nasva as a member of a ski patrol led by company commander First Lieutenant

Kalejs (9, 17). This company led by Kalejs was a part of the Arajs Kommando (17). Near Nasva he participated in an attack on a village allegedly containing partisans. He testified that he was also present at the battle in mid-March 1942 where German General Stahlecker was fatally wounded (12), and he heard that inhabitants of the village had been driven into one building and the building burned (13).

Karlis Rozkalns accidently injured his leg at the front and was sent first to Berlin and then back to Riga where he served in the canteen at the Arajs Kommando headquarters on Krisjana Borona street. He testified that he saw Kalejs at the canteen in uniform four or five times (21, 58). Karlis Rozkalns remembered there being three company commanders in the Arajs Kommando, of which Kalejs was one

(59). The canteen was later transferred to Kalnv Street (13, 52-53).

Georgs Pimanis (Ex. 93CT, 9-23-87

Georgs Pimanis testified that he severed as an armed guard of the Arajs Kommando at the Salaspils camp for five days to two weeks at the end of August or beginning of September 1942 (9). During this time he saw Kalejs at the Salaspils camp one time. Kalejs was wearing a Latvian Army uniform. It was Georgs Pimanis' understanding that Kalejs was a Senior Lieutenant, the commander of a company in the Arajs Kommando, and that he was at the camp to recruit soldiers (10-13, 17, 30-31). At Salaspils, Georgs Pimanis, as a member of the external guards, was under the command of Grundmanis (14, 21). He testified that the internal guard unit at Salaspils was composed of Germans led by German officers

Krause, Nickels, and Teckemeier, and the Latvian Viduss (29). Georgs Pimanis testified that there were approximately 20 Jews remaining at Salaspils at the time he was stationed there, and that the rest had been shot in the Bikernieki Forest. These 20 Jews were distinguished by a Star of David on their clothing (16-18). George Pimanis also noted that there were women and Soviet children at the camp (19). After Salaspils, Georgs Pimanis served at the Bene detention camp for political prisoners (21-22), and occasionally also at the Sauriesi camp (26).

D. Respondent's Deposition Witnesses

Edgars Jurgitis (Ex. 82CT, 9-15-87)

Edgars Jurgitis joined the Arajas Kommando in July 1941 and remained until the end of the war in 1945. He served as an office worker in the supply department

under Elmuts at the Arajas Kommando headquarters at 99 Krisjana Barona Street in Riga. Edgars Jurgitis stated that the Arajs Kommando was also known as the Latvian Security Auxiliary Police and was subordinate to the German Security Police (23). Edgars Jurgitis testified that at headquarters he saw office data naming Kalejs. He also saw Kalejs at the supply department setting accounts with Elmuts, although he did not speak to Kalejs.

Edgars Jurgitis testified that on three different occasions and locations, for a couple of hours each occasion, he was assigned to guard roads leading into the woods (20, 26). He heard gunfire coming from the woods and later heard talk among Arajs Kommando members that Jews had been executed by Germans in the forests while the Arajs Kommando stood guard. He also

indicated that he heard people say that columns of people had been marched from Riga Ghetto towards the Rumbula Forest.

Jekabs Kalnins (Ex. 85CT, 9-18-87)

Jekabs Kalnins testified that he served as an editor in the Arajs Kommando (17) from the end of July 1941 thru February or March of 1942 (9), and that during this time or any time 1941-44 he did not know Kalejs (9). During the 8 months that Jekabs Kalnins was a member of the Arajs Kommando he witnessed such atrocities as the burning of two synagogues and the execution of Jews in the Bikernieki Forest outside of Riga. (10-11, 22-25). He first met Kalejs in a displaced persons camp in Germany in 1948 or 1949.

Gennadij Murnieks (Ex. 86CT, 9-18-87)

Gennadij Murnieks testified that he does not know a man by the name of Kalejs (9).

Gennadij Murnieks entered service in the Arajs Kommando in July of 1941 in response to an announcement over the radio calling for Latvians to register at Arajs Kommando headquarters at 19 Valdemara Street in Riga (32). These headquarters later moved to Krisjana Barona Street (40). He testified that the Arajs Kommando was subject to Dr. Lange of the SD and Sicherheitsdienst (30-31). Gennadij Murnieks estimated that membership in Arajs Kommando was about 200 when he joined and grew to 6 or 7 hundred by the end of 1941 (39).

As a member of the Arajs Kommando, Gennadij Murnieks participated three operations where he transported prisoners from the central prison to the Bikernieki forest where the prisoners were shot (11). Gennadij Murnieks noted that the first prisoners were Jews (43). He stated that

both Germans and members of the Arajs Kommando did the shooting (44). Gennakij Murnieks also stood guard at the December 1941 liquidation of the Riga Ghetto, where Jews had been quartered subsequent to the German armed forces' arrival in July of 1941. Gennadij Murnieks stated that on this one day operation 20,000 Jews were marched from the ghetto to Rumbula where they were stripped and shot (49-52). Viktors Arajs, Dr. Lange, and a German officer Krause from the SD were present at these operations, and all three gave orders (45-48).

Gennadij Murnieks also participated in an Arajs Kommando action with Viktors Arajs and German officers against a synagogue on Gogolu street in Riga. Gennadiji Murnieks testified that the synagogue was burned down, and that he heard screams

coming from the basement of the building (12, 17-23, 35). Gennadij Murnieks served as a guard at a second ghetto for Jews at Jumpravmuiza in early 1942 (57-61). Beginning In June or July 1942 Gennadij Murnieks was sent to Byelorussia and then to Vileika where he served as a guard at Arajs Kommando headquarters (71-77).

Gennadij Murnieks testified that he served as an exterior guard at the Salaspils camp from summer to fall of 1943 (63). He had orders to shoot anyone who tried to escape. There were 30-40 exterior guards, all members of the Arajs Kommando, at the camp. The external guards did not go inside the camp. Only the German internal guard unit led by Krause and his assistant had contact with the prisoners inside the camp (67-70). Gennadij Murnieks stated that Arajs Kommando

guards did escort prisoners on work details to Sauriesi (68-69).

Ernests Karklins (Ex. 87CT, 9-19-87)

Ernests Karklins served as a junior investigator in the Department of Latvian SD. His supervisor was Herberts Teidemanis (8). Ernests Karklins testified that he met Viktors Arajs once and does not know Kalejs (10). Ernests Karklins stated that the action against the Jews was headed by the German SD "Operation Division" under the command of Dr. Lange. In Ernests Karklins' opinion, the Arajs Kommando was not involved in this operation (15-16).

Osvalds Elins (Ex. 88CT, 9-19-87)

Osvalds Elins supervised a transport of vehicles for the Arajs Kommando in a garage on Krisjana Borona Street and later on Kalnv Street in Riga. His service

apparently began in 1941 and lasted until the end of the war. He stated that there were 150-300 men in the Arajs Kommando at the time he joined (36). Osvalds Elins testified that he knew Viktors Arajs well. He also named several other Arajs Kommando members including Tobias, Eglitis, Leipins, Svikers, Elmuts, Ozols and Smalkais. However, Edgars Jurgitis did not remember Kalejs from this period (12-14, 34, 37). Osvalds Elins testified that in the second part of 1941 all the members of the Arajs Kommando who were not on specific duty were engaged in actions of shooting civilians in the forests near Riga (27-28). He stated that one could get more ration cards if one was a member of the Arajs Kommando (35).

Leonids Jansons (Ex. 91CT, 9-22-87)

Leonids Jansons testified that he joined

the Arajs Kommando at the beginning of July 1941, and that sometime in July he met Kalejs at Arajs Kommando headquarters on Valdemara Street in Riga (7-8). Leonids Jansons did not mention any activities involving Kalejs and testified that he does not remember what Kalejs looked like (34). He remained at Arajs Kommando headquarters for about 1-2 months (59). At Arajs Kommando headquarters, Leonids Jansons assisted in producing identification certificates and distributing armbands for the organization (12). As an Arajs Kommando member, he assisted in making arrests of Jews, transporting prisoners to Bikernieki were they were executed by Arajs Kommando members, and acting as a guard at the burning of a synagogue in the Moscow section of Riga (14-20). He testified to the existence of a board of concentration camps formed under German

supervision by more moderate members of the Arajs Kommando who did not condone the executions (60). This organization administered a camp at Vidzeme Barracks near Riga (65-73). In December 9141 Leonids Jansons resumed study in the University in the civil engineering department and continued to work in one Zeldner's office (10). He recalled that he did not submit proof of military service in order to enter the university (33).

E. Respondent Konrads Kalejs

The following is a brief summary chronology of events taken from the respondents direct examination, cross-examination, and 1984 interview with Jeffrey Mausner.[3] The respondent's testimony is

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[3] The March 1984 interview (Ex. 17) was admitted over objection from the respondent. The Government presented the interviewer, Jeffrey Mausner, a former trial attorney with the Office of Special Investigations, who identified the respondent as Konrads Kalejs from prior contact with the

further addressed in part IV below.

The respondent testified that he is Konrads Kalejs, born July 26, 1913, in Latvia (Tr. 1140; Ex. 17 at 6-7). He studied at the Latvian Military Academy from 1934-37 where upon graduation he served in the Latvian Army until 1940 (Tr. 1141; see Ex. 5 to Ex. 17, Ex. 17 at 19). He stated that he was at the Salaspils camp several times between 1937 and 1941, prior to German occupation, when the camp was a Latvian army summer camp (Tr. 1171-72; Ex. 17 at 64-65). From March to Sep-

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respondent including the interview (Tr. 869-74). Mr Mausner and Lori Judd, a certified court reporter, identified Exhibit 17 as the original transcript of the interview (Tr. 871, 891-93). Ms. Judd testified that Exhibit 17 is a true and correct transcription of the sworn statement taken on March 1, 1984 (894-899). She also identified the respondent as the interviewee and Mr. Mausner as the officer who conducted the interview (892-94). The record reflects that the respondent had prior notice of the scheduled interview (Ex. 17 at 7, 9, Ex. 1 to interview; Tr. 887-89, 1194). I find that the notice was adequate, and that the interview was not coercive or otherwise conducted in violation of the respondent's due process rights.

tember of 1940 the respondent attended a Latvian army staff college.

The respondent testified that during 1940 the Russian army occupied Latvia. The respondent served in the "Red Army" from 1940 to the end of June 1941 (Tr. 1141). During part of this period the respondent was stationed at the home of a pastor named Namgauds in Nurmuiza in Talsi (1142). He was in service "at regimental headquarters" with the Red Army when the German forces invaded the beginning of June 1941 (Tr.1143).

The respondent joined a "self-defense" unit for about one week, the first week of July 1941 (Tr.1145, 1228, Ex. 17 at 25). He arrived in Riga in mid-July 1941 (Tr. 1145). There he registered with other Latvian officers at the Latvian Society Building on Merekela Street (Tr. 1145-46)

in response to announcements over the radio and in the newspapers (Tr. 1260). He traveled to his summer home and then returned to Riga where he worked two to three weeks in a clothing store (Tr. 1-145). The respondent testified that several times during the period July thru September 1941 he went to Nurmuiza where he did farmwork, cared for horses, and assisted the pastor at whose farm he had been stationed as a member of the Red Army (Tr. 1146-47, 1266-67). In late October or early November 1941 the respondent enrolled in classes at the university at Riga (Tr. 1148, 1150-51).

In January of 1942 the respondent met with German officer Schroeder in Riga. A few days later, at the end of January or early February 1942, the respondent took command of a ski patrol company and was

given orders to fill up the German front in eastern Latvia. The respondent's company headed by train and/or truck to Cholm, and then was rerouted southward to Dno (Tr. 1151-59).

The respondent testified that in March 1942 he participated in the battle where German General Stahlecker was fatally wounded. The respondent estimated that this battle took place somewhere between Dno and Welike Luki (Tr. 1157-60; Ex. 17 at 28-30, 75-82).

In September or October 1942 the respondent was relieved of his command because of illness due to ulcers (Tr. 1162). He returned to Riga where he was examined at the Riga hospital. He reported to Schroeder who presented the respondent with a "close combat" award (Tr. 1259-60). He then took up residence at his family's

Riga apartment and resumed studies at the university (Ex. 17 at 31-32). The respondent estimated that during the subsequent period to the end of 1944 he spent approximately 50% of his time in Riga and the rest in Nurmuiza, Gulbene, or Blavinas performing mostly farmwork or attending to his studies (Tr. 1164; Ex. 17 at 89-91). He continued to receive a salary from the German army (Tr. 1230). In March of 1943 he was married (Tr. 1164).

The respondent stated that in the summer of 1944 he was called up by the Latvian Legion Recruiting Office (Tr. 1166; Ex. 17 at 23). He left for Germany at the end of November 1944 and arrived in Germany on December 1, 1944 (Tr. 1172). The respondent fought in the Latvian Legion until sometime in 1945 when he was wounded in battle near Danzig (Tr. 1172). He was

sent to Germany and then, after he recuperated sufficiently, to Denmark (Tr. 1172). The respondent was in Denmark when the war ended on May 8, 1945 (Tr. 1172).

The respondent remained in Denmark until sometime in 1947 when he went to a displaced persons camp in Rotenburg, Germany (Tr. 1173). In October 1950 he traveled to Australia where he acquired citizenship (Tr. 1177-78). On February 6, 1959, the respondent immigrated to the United States (Tr. 1182; Ex. 17 at 10).

III. Statutory Standard for 241(a)(19)

Section 241(a)(19) of the Act provides for the deportation of any alien

> ***who during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with --

(a) the Nazi government in Germany,

(b) any government in any area occupied by the military forces of the Nazi government of Germany,

(c) any government established with the assistance or cooperation of the Nazi government of Germany, or

(d) any government which was an ally of the Nazi government of Germany,

ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion.

The statute requires that the persecutions have taken place because of the victim's race, religion, or other specified characteristic. The statute does not require that the persecutor have any per-

sonal animus toward the object of his attacks. Maikovskis v. INS, 773 F.2d 435 (2d Cir. 1985); Matter of Kulle, Int. Dec. 3002 (BIA 1985), aff'd, 825 F.2d 1188 (7th Cir. 1987). Persecution under the statute is not limited to physical harm. H.R. Rep. No. 95-1452, 95th Cong., 2d Sess. 3, reprinted in 1978 U.S. Code Cong. & Ad. News 4704. (See also cases cited in Government's Post-Trial Brief at 89-90).

The respondent argues that the Government must show he actively assisted in persecution. Respondent's Post-Hearing Brief at 66-67, citing United States v. Sprogis, 763 F.2d 115 (2d Cir. 1985); Laipenieks v. INS, 750 F.2d 1427 (9th Cir. 1985). This "active assistance" standard is not controlling in the Seventh Circuit. In the case of a concentration camp guard, Schellong v. INS, the Seventh Circuit

directly held that no personal involvement in atrocities was necessary for an individual to have assisted in persecution under section 241(a)(19). 805 F.2d at 661 (following the Supreme Court's decision in Fedorenko v. United States, 449 U.S. 490 (1981), and rejecting the positions of the Second and Ninth Circuits in Laipenieks and Sporgis). See also Kulle v. INS, 825 F.2d. 1188, 1192-93 (7th Cir. 1987).

IV. Discussion of 241(a)(19) Charge

The first six allegations in the amended Order to Show Cause are established by the respondent's admissions and supporting documentation. The respondent stated that he is Konrads Kalejs and that he was born in Latvia on June 26, 1913. He stated that during the war and until December 1944 he resided in Latvia. Four witnesses testified on behalf of the respondent --

Erns Namgauds, Arvids Elguts, Balva Kula, and Ernest Ozolins -- confirmed the respondent's presence in Latvia at various times from 1940 to the end of 1944. The respondent testified that he is an Australian citizen and identified Exhibit 63 as his Australian Passport. (TR. 1221-1224; see testimony of forensic expert Gideon Epstein). The respondent stated that he immigrated to the United States on February 6, 1959, which is confirmed by his Immigrant Visa and Alien Registration application, Exhibit 16.[4] He has not

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[4] I find that Exhibit 16 is the respondent's Application for Immigrant Visa and Alien Registration as argued by the Government. The respondent testified that the photograph on the visa was his own (Tr.1218). He stated that the applicant signature on the application reads "Konrads Kalejs." He stated that he signed the visa application he submitted (Tr.1220-21). The Government presented signature expert Gideon Epstein who testified that the applicant signature on Exhibit 16 is the respondent's based on comparison to other documents contained in the respondent's A-File, to Exhibit 63, which the respondent admits is his Australian Passport, and to Exhibit 43 on which the respondent identified his own signature (Tr. 604-49; see Government's Post Trial Brief at 52-54; Tr. 1226 (Respondent's identification of signature on

subsequently obtained U.S. Citizenship (Tr. at 1217; see Exs. 95 and 96; Tr. at 932-42 (testimony of Michael Goldstein)).

A. Self-Defense Unit (Allegations 7 and 8).

The respondent admitted that he was a member of a self-defense unit during the first week of July 1941 subsequent to his membership in the "Red Army." His membership in a self-defense unit in Litene is confirmed by Exhibit 74 presented by the Government and acknowledged by the respondent. However, the Government has not shown that as a member of this self-defense unit the respondent assisted or participated in the persecution of persons

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Ex. 43)). The respondent further testified that he signed his Visa before a male consul (Tr. 1281-84). The Government presented Jack Liebof, the vice-counsel whose signature appears on the application. Mr. Leibof testified that he countersigned Exhibit 16, and that the applicant would have signed the application in his presence (Tr. 787, 863-65).

on the basis of their political opinions alleged in allegation 8 of the Order to Show Cause. The Government presented varied documentary evidence supplemented by the testimony of Dr. Hilberg indicating that certain self-defense units had been organized by the German forces, and that the activities of these groups involved persecution (Ex. 20T at 3, 12-15, 21T at 2; 22T at 14-18, 22; 34T at 3; Tr. 131, 135-36 (Hilberg)). This General documentary evidence does not indicate that the group to which the respondent belonged was organized under German direction, and the evidence does not rule out the possibility that self-defense units may have formed independently of direct German influence. Background evidence suggests that Latvian soldiers would willingly band together against the Soviet invasion. See Respondent's Post-Hearing Brief at 2-4. The

Government has not alleged or presented evidence of specific acts of persecution performed by the respondent as a participant of this group or by the group as a whole. Exhibit 74 apparently was signed on 25 November 1941, an opportune time to claim one took part in "terrorizing and pursuing" Communists, whether or not the claim was grounded in fact. The Government itself has argued elsewhere that claimed alliance with the German army against "communists" was attendant with certain privileges. See Government's Post-Trial Brief at 10. The respondent's purpose in contacting the partisan chief for this document was to take advantage of one such privilege, entry into the University (Tr. 1149-50). Finally, the respondent testified that his participation in this unit was as a soldier fighting retreating Russian Troops (Tr. 1145, 1266,

Ex. 17 at 25, 59-64).

B. Arajs Kommando (allegations 9-14, 17).

The Government has presented ample evidence to prove the existence of Latvian Security Auxiliary Police, or "Arajs Kommando," as a Nazi-subordinated organization which assisted in persecuting racially undesirable persons or political enemies of Nazi Germany (Exs. 20T-22T, 26T-28T, 32T-36T). The deposition witnesses (with the uncorroborated exception of Ernests Karklins) testified that members of the Arajs Kommando assisted in persecution which took place in the Riga Ghetto, the forests surrounding Riga, at Salaspils and other concentration or labor camps, and on the eastern front of Latvia. These witnesses confirmed that the Latvian Security Auxiliary Police was led by Viktors

Arajs who was directly responsible to the German officer Dr. Lange. Dr. Hilberg testified to the existence of the Arajs Kommando, its subordination to Nazi officials including General Stahlecker, and its persecutory actions (see also Ex. 19). His testimony was supplemented by that of the survivor witnesses Winter, Servos and Ilberg. The SD and SS were declared to be criminal organizations by the International Military Tribunal at Nuremberg, Germany, as were parts of the Security Police. 6 F.R.D. at 136-43. Viktors Arajs was convicted and sentenced to life imprisonment for his actions in leading the Arajs Kommando (Ex. 22T). Based on this evidence, I find that allegations 9 thru 14, and the second sentence of allegation 17 which alleges the murder of thousands of Jews in the forests surrounding Riga, have been established.

C. Respondent's alleged membership in the Arajs Kommando

(allegations 15-21).

The Government raises four key areas of the respondent's alleged activity in the Arajs Kommando: (1) the period from July 1941 thru December 1941; (2) the respondent's role as a company commander on Latvia's eastern front from January to November of 1942; (3) the respondent's role as the company commander of a guard company and anti-partisan unit in 1943; and (4) the respondent's role as the company commander of the exterior guard unit at the Salaspils and Sauriesi.

(1) July thru December 1941

The respondent testified that he does not remember Viktors Arajs and never served in the Arajs Kommando (Tr. 1212; Ex. 17 at 43, 46). The Government asserts

that the respondent joined the Arajs Kommando on July 29 or 30, 1941 (allegation 15). These dates are based on two certificates offered by the Government. Exhibit 23 is signed by Viktors Arajs and E. Ruda and states that Kalejs was a member of the Latvian Security Auxiliary Police from July 29 to the date of the certificate, November 8, 1941. Exhibit 25 is a certificate signed by Ozols, Assistance Head of the Latvian Security Section, in which Ozols confirms that First Lieutenant Konrads Kalejs, born on 26 June 1913 was in the service of the Latvian Security Section since 30 July 1941 (to the date of the letter, November 5, 1942) and was at the eastern front between 14 Feb 1942 and 27 April 1942. The respondent testified that these certificates are false and were obtained by him from friends so that he could enter the university (Tr. 1243; Ex.

17 at 36, 43-45, 56, 95). I do not find the respondent's explanation to be credible. The respondent testified that he registered at the Latvian Society Building in July of 1941 upon return to Riga. He responded to announcements by radio and newspaper. Gennadij Murnieks testified that he also responded to a radio announcement and that the call was to register with the Latvian Security Auxiliary Police (Ex. 86CT at 32). The respondent testified that he returned to the Latvian Society Building several times expecting word that he was to be mobilized. There is no evidence to support an assertion that such mobilization would not be in conjunction with, or under supervision of, the Nazi forces. Moreover, Lenoids Jansons testified that he met Kalejs at Arajs Kommando headquarters on Valdemara Street in Riga in July 1941 (Ex. 91CT at 7-8),

and Rolands Bahsteins testified that Kalejs was one of the first to join the SD in July 1941 (Ex. 89CT at 47). In sum, I do not find the respondent's self-serving explanation of Exhibits 23 and 25 to rebut the evidence that he was at least nominally enrolled in the Latvian Auxiliary Society Police between July of 1941 and January of 1942.

However, I do not conclude that the respondent's mere registration with the Security Police is sufficient to make a finding of assistance in persecution even under the Fedorenko standard. As noted by the Board of Immigration of Appeals in Matter of Fedorenko, Int. Dec. 2963 at 17 (BIA 1984), the "objective effect of the respondent's conduct" must "in some small measure" assist the Nazi's persecution. The Government argues that, due to the

shortage of manpower, the Germans enrolled all available Latvians in the Arajs Kommando and required all members to participate in persecutory acts. Therefore, the Government deduces, the respondent must have participated in persecutory acts. The Government argues by this logical deduction because they have no facts specific to the respondent. No witness, including Leonids Jansons and Rolands Bahsteins, the only witnesses to identify Kalejs as a member of the Security Police during this period, and no documentary evidence presented, identified the respondent as holding some position with the Arajs Kommando prior to January 1942. Dr. Hilberg estimated that the Arajs Kommando began with approximately 50 members and totalled only about 300 by the end of 1941. Yet despite this small number, the respondent, whose alleged participation in

the Arajs Kommando was repeatedly described as that of a company commander of at least 100 men, is not placed by any of the witnesses at any of the numerous arrests and shootings, the synagogue burnings, or the atrocities associated with the Riga Ghetto during 1941. As noted in the preceding paragraph, the evidence reflects that the respondent signed his name to the rolls of the Arajs Kommando in July. There is no evidence of participation or assistance beyond this act until he was called up by Schroeder in January of 1942. I find these facts significantly different than the facts in Fedorenko, supra, or, for example, in the case where an individual could be deemed to have assisted in persecution based on "his position and occupation and for no other reason." Matter of Blach, A10 629 292 (Imm. Ct., Los Angeles, April 27, 1987) at

24-25 (cited in Government's Post-Trial Brief at 90). Moreover, unlike other points in the Government's case, the Government cannot rely on the respondent's own admissions to support the claim that his involvement in the Arajs Kommando exceeded simple registration prior to 1942. The respondent throughout the hearing and in the March 1, 1984, interview maintained that he was not active in military or police service between July 1941 and January 1942 (Tr. 1228). I find that the Government has failed to sustain its heavy burden of proof in establishing that the respondent participated in persecution as a member of the Arajs Kommando prior to 1942.[5]

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[5] In reaching my findings on this and all other issues in the hearing I have given no weight to either party's alleged interview with Viktors Arajs (see (Government's) Ex. 98T, testimony of Thomas Fusi, and Ex. 107; (Respondent's) Ex. 102 and testimony of Georg Buerger). Neither interview was transcribed verbatim and the circumstances

(2) Respondent's activities on Latvia's eastern front in 1942.

The respondent testified that he volunteered for service in conjunction with German forces in Riga in January 1942. He stated that he was appointed company commander of a ski patrol unit by German officer Schroeder and sent to the eastern front in February 1942. The respondent testified that at the front he participated in the battle where German General Stahlecker was fatally wounded (Tr. 1157-62); see also Respondent's report in "Laikmets," Ex. 42). However, the respondent maintains that he was not under the jurisdiction of the Arajs Kommando in his capacity as a company commander, and that he functioned as a soldier, not as one who

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under which they were taken render them without value. See Respondent's Post-Hearing Brief at 23-28; Government's Post-Trial Brief at 60-62.

persecuted civilians (Tr. 1161, 1170, 1244-48, 1252-60; Ex. 17 at 83, 95). He testified that some villagers were burned and some civilians may have died, but only as a result of combat, not as an act of reprisal or purpose (Ex. 17 at 77-82). The respondent testified specifically that in the battle where Stahlecker was wounded, prisoners were handed over to the Germans, not executed (Tr. 1160, 1280-81).

The respondent's testimony is insufficient to rebut the convincing evidence presented by the Government. Deposition witnesses Rudolfs Soms and Karlis Rozkalns testified that Kalejs was a company commander in the Arajs Kommando, subordinate to the German SD, on Latvia's eastern front in 1942. Both witnesses testified, as noted above, that villages were burned and civilians killed in battles where

Kalejs participated. Rudolf Soms stated that, based on work from members of Kalejs' own unit, inhabitants of the villages near Zabolotye and Sanniki were exterminated. He testified that the killing of villagers at Sanniki was a reprisal for the death of Stahlecker. Kalejs' company was the group who entered the villages on each occasion. Karlis Rozkalns also testified that the civilians in the village where Stahlecker was wounded were killed. Dr. Hilberg testified that such actions against civilians at the front was typical of the detachment units under the SD (Tr. 267-73). See also Ex. 20T. Rudolf Soms identified two photographs which he had identified in an investigation in 1983 as photographs of Kalejs (Ex. 81 CT at 53, Government's Dep. Ex. 1; compare photographs in Ex. 5 and 6 to Ex. 17). Karlis Rozkalns also identi-

fied his prior choice of Kalejs' photograph (Ex. 92CT at 25). Mr. Soms also identified a photograph presented by the respondent's attorney (Respondent's Dep. Ex. 19) which I believe corresponds to the respondent's graduation photograph from the Latvian Military Academy as presented in Exhibit 108 at 35 (81CT at 74).[6]

The Government introduced several documents relevant to the respondent's participation on the front. Exhibit 37 confirms his participation with the "Loknja Detachment" at Nasva, Sanniki, and Rogova in early 1942, and was issued by the Security Police and SD, Einsatzgruppe A. See also Exhibit 25. Exhibit 45 is a note signed Kalejs, dated 15 May 1943, to the Registrar's Office of the University and

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[6] I do not give significant weight to the inconsistencies in physical descriptions of Kalejs by the deposition witnesses for the reasons stated in the Government's Post-Trial Brief at 28 n.17.

states: "I hereby inform you that I am in the service of the Commander of the Security Police and SD of Latvia - in the Latvian Security Section as company commander." The respondent testified that he submitted this note along with Exhibit 23 to the university in conjunction with the request for a program transfer. The respondent explained that he did not in fact belong to the Latvian SD as he indicated in Exhibit 45, but that he characterized his duty at the front under the German Ostland Police in this fashion in order to obtain his program transfer (Ex. 17 at 30-42, 95-96). However, while proof of military service may have been required for the university, the respondent gives no credible reason as to why membership in the Latvian Security Police would suffice for the university, but command of a Latvian company under direct supervision of

General Stahlecker, commander for the entire SD of the Ostland reason, would not. Moreover, the respondent's statement that he submitted documents which were convenient to him at the time does not address Exhibit 45 since he wrote that himself. (Ex. 17 at 98).

After careful consideration of the evidence, I find that the Government has shown by clear, convincing and unequivocal evidence that the respondent was a member of the Arajs Kommando under the supervision of the German SD on the eastern front of Latvia from January thru fall of 1942, that persecution against individuals based on race, religion, national origin, and political opinion was committed by the Arajs Kommando and German SD during the period at the front, and that the respondent assisted and participated in this

persecution.

(3) Respondent's role in Porkhov and Skaune in 1943

Karlis Strazds testified that he served under Kalejs in Prokhov between June and August 1943. He stated that as a member of Kalejs' company in Porkhov he guarded a labor camp consisting of 200 Latvian Jews. Karlis Strazds also testified that his platoon guarded the site where 20-30 Gypsies were executed by Germans. In August both Karlis Strazds and Kalejs returned to Riga, the company was reorganized, and Karlis Strazds was sent as a member of Kalejs' company to Skaune. Karlis Strazds related that in Skaune a woman prisoner was required to serve as a charwoman for the officers. Karlis Strazds lacked detailed information on this woman or how she was treated as a prisoner. The testi-

mony of Karliz Strazds is the only evidence that the respondent was present in Porkhov or Skuane in 1943. However, his testimony is consistent in itself and does no conflict with dates given by other witnesses as to the respondent's location at this time. Karlis Strazds served under Kalejs at Salaspils, Porkhov and Skaune. He also read about Kalejs in "Laikmets" in 1942. He testified that the individual depicted in "Laikmets" was the same person that he served under. He identified the photograph on Respondent's Deposition Ex. 19 which corresponds in likeness to the photograph of Konrads Kalejs in Ex. 108. This identification is consistent with that of Rudolfs Soms. Karlis Strazds also verified and adopted his prior photo identification of Kalejs.

The respondent testified that he did not

serve with a police or military unit in 1943. As noted by the Government, it is questionable that he would continue to be paid, as he said he was, absent active duty. The respondent's witnesses were not certain as to the dates they may have seen the respondent in 1943 in Riga or Nurmuiza and their testimony does not indicate that the respondent could not have served in Porkhov or Skaune in 1943. The respondent's marriage places him in Riga in March 1943. Karliz Strazds testified that the Kalejs unit did not travel to Porkhov until June of 1943.

Based on Karlis Strazds' testimony, I find that in association with the Nazi army the respondent was the company commander of a guard unit at a camp for Latvian Jews in Porkhov and that members of his company participated in execution of

20-30 Gypsies in Porkhov. I therefore find that the respondent assisted in the persecution of individuals based on race, religion national origin or political opinion in Porkhov in 1943.

(4) Salaspils and Sauriesi Camps

The Government also has established that the respondent was the company commander of the exterior guard unit at Salaspils and that details from this unit guarded the camp at Sauriesi. Karlis Strazds, Rolands Bahsteins and Viktors Ennitis all testified that they served as exterior camp guards under the command of First Lieutenant Kalejs at Salaspils. Karlis Strazds was personally appointed by Kalejs to Sauriesi in Dec of 1942. Georgs Pimanis also places Kalejs at the Salaspils camp in contrast to the respondent's testimony that he never visited the camp

subsequent to the German invasion of Latvia. That Gennadij Murnieks did not see Kalejs at the Salaspils camp in the fall of 1943 is consistent with the testimony of Karlis Strazds who stated that about this time Kalejs was transferred back to the front. The testimony of these individuals concerning the role of the Kalejs exterior guard unit at Salaspils and Sauriesi, the company's subordination to the Arajs Kommando and German SD, the type of prisoners -- including Jews and political prisoners, and the atrocities which took place is credible and consistent with each other, Dr. Hilberg, and the former inmates Winter, Servos and Ilberg. Based on the evidence noted in detail above, I find that the respondent was the company commander under the Arajs Kommando and German SD of the armed exterior guard unit at Salaspils and Sauriesi, and that these

camps were forced labor camps containing, among others, Jews and political prisoners. Consistent with the Court's decision in Fedorenko, I find that the respondent's position and activities at Salaspils and Sauriesi constituted assistance and participation in persecution in the persecution of individuals because of race, religion, national origin, or political opinion.

The respondent's proscribed activity occurred between March of 1933 and May of 1945. His action on the eastern front in 1942, his role at the Salaspils and Sauriesi camps, and his participation at Porkhov and Skaune in 1943 were under the leadership of the Arajs Kommando in association with the Nazi military and civil authorities responsible for the occupation of Latvia. The incarceration, forced

labor and brutal treatment of the Jews and political prisoners at Salaspils, Sauriesi and Porkhov, the killing of civilians at the front, and the execution of Gypsies at Prokhov were acts of persecution because of race, religion, national origin, or political opinion. The respondent assisted and participated in this persecution. Therefore, I find that the respondent is deportable under section 241(a)(19) of the Act as charged. Therefore, he is not eligible for any form of relief from deportation.

V. Inadmissibility under section 212(a)-(19) of the Act

The respondent did not disclose his wartime activities when applying for a visa to immigrate to the United States. In the March 1984 interview of the respondent, the respondent indicated that he did

not disclose his service during the war because he believed the true facts might disqualify him from obtaining his visa (Ex. 17 at 87-88). Witness Jack Liebof, the consular officer who issued the respondent's visa, testified that had the respondent revealed his involvement with German authorities in Latvia he would have referred the application to his supervisor for an advisory opinion. Thomas Valenza, retired State Department officer who rendered such opinions, testified that anyone who collaborated with the Nazis in Nazi-occupied Europe, or who had cooperated as a civilian official in the Nazi war efforts and policies regarding Jews and political dissidents, would have been rejected under section 212(a)(27) of the Act (Valenza Deposition at 16, 26). Based on this evidence, I find that the respondent's failure to reveal his wartime ac-

tivities when applying for his U.S. visa was a wilful and material misrepresentation. Kungys v. United States, 108 S.Ct. 1537 (1988); see also Matter of Bosuego, 17 I&N Dec. 125 (BIA 1980). Therefore, I find that the respondent is deportable under sections 241(a)(1) and 241(a)(2) on the underlying grounds of 212(a)(19) and 212(a)(20) as charged in the Order to Show Cause.

U. S. Department of Justice

Decision of the Board of Immigration Appeals

Executive Office for Immigration Review

Falls Church, Virginia 22041

File: All 655 361 - Chicago Date: APR 30 1992

In re: KONRADS KALEJS

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Ivars Berzins, Esquire

484 West Montauk Highway

Babylon, New York 11702

ON BEHALF OF SERVICE: Neal M. Sher

Director, Office of Special Investigations

Bruce J. Einhorn

Deputy Director

Betty-Ellen Shave

Senior Trial Attorney

Ronnie L. Edelman

Senior Litigation Counsel

ORAL ARGUMENT: September 21, 1989

CHARGE:

Order: Sec. 241(a)(1), I&N Act [8 U.S C. § 1251(a)(1)] - Excludable at entry under section 212(a)(19), I&N Act [8 U.S.C. § 1182(a)(19)] - Procured visa by fraud or willful misrepresentation of a material fact

Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)] Excludable at entry under section 212(a)(20), I&N Act [8 U.S.C. §1182(a)(20)] - No valid immigrant visa

Sec. 241(a)(2), I&N Act [8 U.S.C. § 1251(a)(2)] - In the United States in violation of section 212(a)(19), I&N Act [8 U.S.C. §

1182(a)(19)]

Sec. 241(a)(2), I&N Act [8 U.S.C. § 1251(a)(2)] - In the United States in violation of section 212(a)(20), I&N Act [8 U.S.C. § 1182(a)(20)]

Sec. 241(a)(19), I&N Act [8 U.S.C. § 1251(a)(19)] Participation in Nazi persecution

APPLICATION: Termination of proceedings

In a decision dated November 1, 1988, the immigration judge found the respondent to be deportable as charged, determined that the respondent was ineligible for any relief from deportation, denied the respondent's motion to terminate the proceedings, and ordered the respondent's deportation to Australia. The respondent has appealed. The Board of Immigration Appeals heard oral argument in this case

on September 21, 1989. The appeal will be dismissed.

The respondent is a 78-year-old native of Latvia and citizen of Australia. He was admitted to the United States as a lawful permanent resident on February 6, 1959. On March 18, 1988, the Government issued an amended Order to Show Cause (Gov. Exh. 15), served on the respondent by express mail on March 22, 1988, charging him with deportability under sections 241(a)(1), 241(a)(2), and 241(a)(19) of the Immigration and Nationality Act ("the Act").[1]

In the amended Order to Show Cause, the Government alleged that the respondent

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[1] The Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, revised the grounds of deportation in the Act. See id. at section 602. The grounds of deportation which correspond to former sections 241(a)(1), 241(a)(2), and 241(a)(19) of the Act are sections 241(a)(1)(A), 241(a)(1)(B), and 241(a)(4)(D), respectively. The revisions, however, do "not apply to deportation proceedings for which notice has been provided to the alien before March 1, 1991." Id. at section 602(d).

belonged to a self-defense unit in Litene, Latvia, in June and July 1941, and that as a member of this unit he assisted or participated in the persecution of persons on the basis of their political opinions. The Government alleged also that on July 29 or 30, 1941, the respondent joined the "Arajs Kommando," a Kommando unit organized by Viktors Arajs in Riga, Latvia, which was subordinate to the German Security Police and "SD" ("Sicherheitsdienst");[2] the "Arajs Kommando," as provided in the Order to Show Cause, was responsible for the murder of thousands of Jewish men, women, and children near Riga from July 1941 to January 1942. The Government alleged further that the respondent served as a first lieutenant and company commander in the "

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[2] The Order to Show Cause also provides that the "SD" was a branch of the German Schutzstaffel ("SS").

Arajs Kommando," that during the period July 1941 to December 1944, the respondent served as commander of an "Arajs Kommando" guard unit in concentration camps in the "Ostland," and that during the same period the respondent had "assisted or participated in the shooting of civilians, including gypsies, and in the destruction of at least one village" (Gov. Exh. 15). The Government alleged too that the respondent willfully misrepresented a material fact in his application for an immigrant visa when he stated in the application that he was a farm laborer in Latvia from 1941 to 1944.

On November 12, 1986, the immigration judge issued an order authorizing the Government to depose certain witnesses in

Riga, Latvia, [3]pursuant to 8 C.F.R. § 242.13(e). [4]Deposition testimony was taken by the Government, and by respondent's counsel, in Riga, Latvia, in September 1987. [5]The Government deposed seven witnesses in Riga, and respondent's counsel deposed six separate witnesses. Deportation hearings were held before the immigration judge in April, May, and August of

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[3] The respondent filed an interlocutory appeal of the immigration judge's order allowing the Riga depositions. The Board dismissed the appeal on March 19, 1987.

[4] The regulation which authorizes the deposition of witnesses in deportation proceedings was revised on January 29, 1987, before the Riga depositions were conducted. The regulation concerning depositions now appears at 8 C.F.R. § 3.33.

[5] While the instant appeal was pending, the Soviet Union recognized Latvia's independence. See, e.g., Soviets Recognize Baltic Independence. Ending 51-Year Occupation of 3 Nations, New York Times, September 7, 1991, at A1. The Soviet Union later transformed into the Commonwealth of Independent States. See, e.g., Ex-Soviet Republics Sign Charter, Washington Post, December 22, 1991, at A1. We take administrative notice of these changes in foreign governments. See Matter of Chen, Interim Decision 3104 (BIA 1989). When we refer to the "Soviet Union" in this decision, however, we will be discussing that nation as it existed when the proceedings in this case were held before the immigration judge.

1988.

In his written decision dated November 1, 1988, the immigration judge ruled that the Soviet deposition testimony was "admissible as probative and not inherently untrustworthy" (i.j. dec. at 5). The immigration judge further concluded that the Government had established the respondent's deportability as charged in the amended Order to Show Cause. The respondent has raised three general arguments in his brief on appeal: he asserts that the immigration judge erred by admitting and giving weight to the deposition testimony that was taken in the Soviet Union; he contends that the immigration judge erred in finding the respondent to be deportable under section 241(a)(19) due to his "Arajs Kommando" activities; and he argues that the immigration judge erred in finding the

respondent to be deportable because he had willfully misrepresented a material fact in order to procure an immigrant visa.

Prior to addressing the respondent's arguments on appeal, we will summarize the testimony of the Government's expert witness, the significant documentary evidence offered against the respondent, and the respondent's testimony. [6]

THE GOVERNMENT'S EXPERT WITNESS

Dr. Raul Hilberg, a professor of political science at the University of Vermont, appeared to testify as the Government's expert witness in the instant proceedings. Dr. Hilberg stated at the hearing that he had studied the holocaust for approximate-

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[6] We find that it is unnecessary to summarize the testimony of the a deposition witnesses (i.j. dec. at 9-22), as well as the testimony of the survivor witnesses from the Salaspils concentration camp (i.j. dec. at 7-9), because the immigration judge's decision contains comprehensive summaries of those testimonies.

ly 40 years (Tr. at 72). He defined the "holocaust" as "the process culminating in the physical annihilation of the Jewish people in Europe between 1933 and 1945" (Tr. at 72). Dr. Hilberg is the author of The Destruction of the European Jews (Gov. Exh. 18). Dr. Hilberg testified that he has given testimony as an expert witness in a total of nine deportation and denaturalization cases (i.j. dec. at 5 n.1).

Dr. Hilberg provided the following testimony regarding the Nazi occupation of Latvia during World War II. He testified that the German Army entered the Baltic States on June 22, 1941, when Germany began its attack on the Soviet Union (Tr. at 96-97). He stated that the Government of Nazi Germany's policy with respect to Jews, Gypsies, and certain communists found in Latvia was to annihilate them (Tr. at 97, 129-30). The German mobile

units which had the responsibility of carrying out this annihilation policy were known as "Einsatzgruppen" (Tr. at 97-98, 104, 107). Dr. Hilberg testified that the "Einsatzgruppen" would follow closely behind the advancing German Army, so that Jews and others could be killed before they became aware of the annihilation practice (Tr. at 105-06). The "Einsatzgruppen" were also deployed to combat Soviet partisans operating along the eastern front (Tr. at 105).

Dr. Hilberg testified further that "Einsatzgruppe A" was responsible for operations in Latvia (Tr. at 100, 106; Gov. Exh. 19). The commander of "Einsatzgruppe A" was originally the German General Stahlecker (Tr. at 106). Dr. Hilberg stated that the commander of "Einsatzgruppe A" was subordinate to Heydrich, and

later Kaltenbrunner, of the Reich Main Security Office ("RSHA"), who in turn were subordinate to Himmler, the head of the "SS" (Tr. at 106-07; Gov. Exh. 19). Dr. Hilberg stated that General Stahlecker prepared reports, or "Ereignismeldungen," which were filed with the RSHA in Berlin, and in which Stahlecker described the activities of "Einsatzgruppe A" (Tr. at 117-23; Gov. Exhs. 20, 34).

According to Dr. Hilberg, "Einsatzgruppe A" was further divided into "Einsatzkommandos" and indigenous auxiliary forces; "Einsatzkommando 2," which had territorial authority over Latvia, arrived in Riga on July 1, 1941 (Tr. at 108-09, 128-29; Gov. Exhs. 19, 20). The leaders of "Einsatzkommando 2," in chronological order, were the Germans Batz, Strauch, and finally, Lange (Tr. at 110; Gov. Exh. 19). Under a paral-

lel chain of command, the "SS" and police leader for Latvia was the German General Schroeder (Tr. at 111-12; Gov. Exh.19). The German official who oversaw the formation of a ghetto for Jews in Riga and labor camps in the surrounding area was named Krause (Tr. at 113-15; Gov. Exh. 19).

Dr. Hilberg explained that the mission of "Einsatzkommando 2" in Latvia was to kill Jews and Gypsies, and to detain and sometimes kill political opponents such as communists (Tr. at 129-30). "Einsatzkommando 2" had only 170 members when it arrived in Riga, and there were approximately 70,000 Jews in Latvia at the beginning of the Nazi occupation (Tr. at 129-30, 220). Therefore, "Einsatzkommando 2" began in 1941 to utilize indigenous personnel in Latvia so that it could carry

out its policy of annihilation there (Tr. at 130-31). One such indigenous unit that was formed was the "Arajs Kommando," named for its leader, Viktors Arajs (Tr. at 139). [7]The "Arajs Kommando" was also known by the names "Latvian Security Division," "Latvian Auxiliary Security Police," and "Latvian Security Section" (Tr. at 136-37).

Dr. Hilberg testified that the "Arajs Kommando" was formed immediately after the German occupation of Latvia, during the first few days of July 1941 (Tr. at 138). Some of the members of the "Arajs Kommando" were former members of the Latvian Army, which had been incorporated into the Soviet Army following the Soviet occupation of Latvia in 1940; these former Lat-

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[7] Viktors Arajs was tried in West Germany for his war-time activities, and he was sentenced to life imprisonment in 1979 (Tr. at 139-40; Gov. Exh. 22). He died in prison in January 1988.

vian Army members were eager to desert the Soviet Army, and some seized the opportunity to join the "Arajs Kommando" (Tr. at 148-49).

Dr. Hilberg stated that the "Arajs Kommando" had 50 or 60 members when it was formed in July 1941; 100 members by August 1941; several hundred members by the end of 1941; and at least 700 members during the years 1942 and 1943 (Tr. at 158-59). After the "Arajs Kommando" had over 100 members, it was divided into companies (Tr. at 162-63). At least six such companies were eventually formed between 1941 and 1944 (Tr. at 162-63; Gov. Exh. 19). The company commanders of the "Arajs Kommando" reported to Arajs, who, after December 1941, reported to Lange, the head of "Einsatzkommando 2" (Tr. at 164-65; Gov. Exh. 19).

Dr. Hilberg testified that he had vast experience in examining captured Nazi documents; he said he had examined thousands of these documents in his career (Tr. at 76-79). During the hearing, Dr. Hilberg was shown copies of documents in the Latvian and German languages which indicate that Konrads Kalejs joined the "Arajs' Kommando" in late July 1941, that his rank was first lieutenant, and that he was a company commander in the "Arajs Kommando" (Tr. at 165-77, 305-07; Gov. Exhs. 23, 25, 45).

Dr. Hilberg also stated that the "Arajs Kommando" headquarters were located on "Herman Goering Strasse" in Riga; this street was known as "Valdemara Street" prior to the German occupation of Latvia (Tr. at 178-79; Gov. Exh. 23). The headquarters were moved to Krisjana Barons

Street in 1942 because the "Arajs Kommando" had increased its membership (Tr. at 180; cf. Gov. Exh. 23--"Hermann Goering Str. 19," with Gov. Exh. 25--"Kr. Barons-Str. 99").

Dr. Hilberg testified that the "main task" of the "Arajs Kommando" between July 1941 and early 1942 was to round up civilians, guard them, and kill them (Tr. at 137, 227-28). At the hearing, Dr. Hilberg reviewed German documents indicating that as of August 10, 1941, "Einsatzkommando 2," acting with the assistance of the "Arajs Kommando" and other auxiliaries, had killed 29,000 civilians in Latvia and Lithuania; approximately 90 percent of these civilians were Jewish (Tr. at 189-90, 195; Gov. Exh. 27 at 3). Because the "Arajs Kommando" had only about 100 members in August 1941, Dr. Hilberg surmised

that the number of "Arajs Kommando" members involved in the killings during this period "must have been close to 100 percent" (Tr. at 190-91).

Dr. Hilberg explained that when the Nazi Government in Berlin ordered the deportation of thousands of German Jews to Riga and other areas in the East, the "SS" leaders for Latvia decided to liquidate the ghetto in Riga to make room for the incoming Jews (Tr. at 202-07, 210-11; Gov. Exhs. 29-30). The influx of Jews also necessitated the construction of a concentration camp near Riga at Salaspils; the concentration camp opened there in December 1941 (Tr. at 206, 234). In order to liquidate the Riga ghetto, 27,800 Jews were shot in the woods near Riga in late November and early December 1941 (Tr. at 210-11, 217-18; Gov. Exhs. 32-33). Members

of the "Arajs Kommando" were involved in the guarding and shooting of Jews in these mass executions in the woods outside Riga (Tr: at 221-22). "Arajs Kommando" members in groups of 30 to 40, or at most 50 to 60, also travelled by bus to other areas in Latvia in order to carry out mass executions of Jews (Tr. at 146-48, 226-27). By January 1942, only 4,000 Jews remained alive of the 70,000 Jews in Latvia when the Nazi occupation began; "Einsatzkommando 2," with the assistance of the "Arajs Kommando , was responsible for more than half of these killings (Tr. at 219-20, 224-25; Gov. Exhs. 33-34).

Dr. Hilberg opined that if the respondent, as an "Arajs Kommando" officer, had been in Riga at the time of the liquidation of the ghetto in late 1941, he "as a matter of course" would have been involved

in the liquidation (Tr. at 223-24, 368-70). Dr. Hilberg also opined that if the respondent was not in Riga during the liquidation operation, he "almost inevitabl[y]" would have been elsewhere in Latvia "doing essentially the same job" (Tr. at 227-28).

Dr. Hilberg testified further that as the "Arajs Kommando" grew larger in membership in 1942, it began to engage in operations against Soviet partisans and some Red Army soldiers in areas along the eastern front (Tr. at 145-46, 262-63). Members of the "Arajs Kommando" assisted the "Einsatzgruppe A" in seeking out and arresting communist party members in the area known as Loknja, which was approximately 250 miles east of Riga and under German control (Tr. at 262, 268-69). "Einsatzgruppe A" and its auxiliaries burned

villages and their inhabitants in this region, and also executed Jews and Gypsies who were found in the area (Tr. at 269-70). Dr. Hilberg observed that although the Soviet partisans and soldiers whom the "Einsatzgruppe A" forces confronted at Loknja were armed, the German casualty reports referred to heavy losses on the side of the partisans, while there were few reports of casualties on the side of the "Einsatzgruppe A" forces (Tr. at 145-46, 272-73, 357-58).

At the hearing, Dr. Hilberg reviewed documents indicating that

Konrads Kalejs served as a first lieutenant in the Loknja detachment of "Einsatzgruppe A" between February and April 1942, and that he participated in fighting at Nasva, Sanniki, and Rogova in February and March 1942 (Tr. at 261-64; Gov. Exhs. 25,

37). General Stahlecker was the commander of the "Einsatzgruppe A" forces during this period; Stahlecker was killed, however, in March 1942 in a battle against partisan forces along the eastern front (Tr. at 106, 283, 288-89). Dr. Hilberg was also shown an "Einsatzgruppe A" report dated March 16, 1942, which provided that 38 Jews and one Gypsy had been summarily executed in Loknja (Tr. at 266-67; Gov. Exh. 38).

Dr. Hilberg gave the following testimony concerning the concentration camp at Salaspils near Riga. When the camp opened in December 1941, there were approximately 1,000 Jewish inmates; these inmates worked on the construction of additional barracks at the camp(Tr. at 233-34; Gov. Exhs. 35, 36). There were 1,500 to 1,800 Jews at Salaspils between December 1941 and the

Summer of 1942 (Tr. at 240). When the construction of the barracks was completed in the Summer of 1942, the Jews were returned to the Riga ghetto to make room for other types of inmates at Salaspils; about eighteen barracks were built at the camp (Tr. at 234, 239). In the Spring of 1943, there were approximately 1,900 political and criminal prisoners at Salaspils, as well as smaller groups of inmates including deserters, partisans, and work-shy civilians; the total inmate population during this period was about 2,000 (Tr. at 241-42, 245, 338). The Salaspils concentration camp was closed in October 1944, when the Soviet Army arrived in Riga (Tr. at 245-46).

Dr. Hilberg stated that the camp at Salaspils had barbed-wire fences, guard towers--including a central watchtower,

and search lights; the inmates were subjected to roll calls (Tr. at 235, 338-39). The prisoners were forced to work to the point of exhaustion, and were given "grossly inadequate" food rations; many died from overwork or starvation (Tr. at 235, 254-55). Inmates who tried to escape or who were too weak to work were shot (Tr. at 256-57). In one instance, two Jews who escaped from Salaspils were caught, returned to the camp, and then executed in front of the 1,000 remaining Jews there (Tr. at 233, 255; Gov. Exhs. 35-36). The Jews at the camp wore "striped prison garb" with a yellow star (Tr. at 241).

Dr. Hilberg testified that he had reviewed testimony from the trial of Viktors Arajs which placed the respondent at Salaspils during the Nazi occupation of Latvia (Tr. at 237, 242-43, 333-34). Dr.

Hilberg stated that he had reviewed documents from the Arajs trial in which a witness named Artur Abols stated that the respondent was the company commander in charge of the guard forces at Salaspils in the Spring of 1943; Dr. Hilberg regarded Abols' statements concerning the respondent's presence at Salaspils to be persuasive because Abols' statements were made shortly after the war and because Abols would have had no reason to "ma[k]e up such a story" (Tr. at 237, 334,- 336-37, 371-72). [8]

Dr. Hilberg testified further that the guards at Salaspils were

"Arajs Kommando" members, and that the company commander had "supreme . . . au-

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[8] 12
8 The record reflects that Artur Abols died on October 18, 1963 (Gov. Exh. 97A).

thority" over the guards and inmates at the camp (Tr. at 237-38, 250-51). The company commander gave the guards at the camp their assignments (Tr. at 251, 347-48). The "Arajs Kommando" members guarded the perimeter of the camp and also escorted work details outside the camp (Tr. at 238-39, 248-49). The guards' treatment of the inmates at Salaspils "var[ied] from harsh to brutal" (Tr. at 250). "Arajs Kommando" members who were guards at Salaspils were involved in the shootings and executions there (Tr. at 257).

Dr. Hilberg testified that there were several work sites near Salaspils to which the guards escorted the inmates; these sites included a peat bog extraction area, one or two saw mills, and a railway yard (Tr. at 247). There was also a quarry several miles to the east of Salaspils at

Sauriesi (Tr. at 247-48).

On cross-examination, Dr. Hilberg stated that he had not viewed the videotapes of the Soviet witnesses who were deposed in these proceedings (Tr. at 320). He testified that he could not state definitely that the respondent had participated in the mass executions of Jews in the woods outside Riga in late November and early December 1941 (Tr. at 370). Dr. Hilberg also stated that he had not seen any captured German documents which placed the respondent at Salaspils in any capacity (Tr. at 337).

SIGNIFICANT DOCUMENTARY EVIDENCE CONCERNING THE RESPONDENT

The most significant documentary evidence submitted by the Government which concerns the respondent in particular consists of the following: exhibits 23,

25, 44, 45, and 74 are certified copies of documents which the respondent has admitted that he submitted to officials at the University of Riga between the years 1941 and 1943. Exhibit 23 is dated November 28, 1941, is signed by V. Arajs, the chief of the Latvian Auxiliary Security Police, and provides that "First lieutenant Konrads Kalejs has been a member of the Latvian Auxiliary Security Police from 29 July, this year, to the present" (Gov. Exh.23). Exhibit 25 is dated November 5, 1942, is signed by K. Ozols, the deputy chief of the Latvian Security Section, and provides that "First Lieutenant Konrads Kalejs born on 26 June 1913, has been in the service of the Latvian Security Section since 30 July 1941 and was at the Eastern front between 14 February 1942 and 27 April 1942" (Gov. Exh. 25). Exhibit 44 is dated September 28, 1942, is addressed to the

rector of the University of Riga, contains a handwritten request to transfer "from the School of Engineering to the Economics Department of the School of Economics and Law," is signed by "First Lieutenant Kalejs," and bears the seal of Lt. Dibietis of the Security Detachment (Gov. Exh. 44). Exhibit 45 is dated "Riga, 15 May 1943," is addressed to the Registrar's Office of the University, is signed by K. Kalejs, and contains a handwritten message which provides: "I hereby inform you that I am in the service of the Commander of the Security Police and SD of Latvia - in the Latvian Security Section as a company commander" (Gov. Exh. 45). Exhibit 74 is dated November 25, 1941, is signed by the head of the auxiliary police of the City of Gulbene, and certifies that "First Lieutenant Konrads Kalejs, of the Fifth Infantry Regiment of Cesis of the former

Army of Latvia actively took part in guerrilla activity from 29 June to 5 July 1941 in terrorizing and pursuing Communists" (Gov. Exh. 74).

Further significant documentary evidence concerning the respondent includes: exhibit 24, which is a certified copy of an officer's identification form dated September 18, 1940, reflecting that Konrads Kalejs was promoted to First Lieutenant in the Latvian Army in 1939; exhibit 24 also reflects that a copy of the officer's identification form was prepared on November 22, 1941, and certified by Arajs, the chief of the Latvian Auxiliary Security Police, "for submission to educational institutions" (Gov. Exh.24). Exhibit 37 is a certified copy of a document dated April 30, 1942, bearing an illegible signature from a captain of the Security Police and

SD, "Einsatzgruppe A," Loknja Detachment, and certifying that First Lieutenant "Konrad Kalejs was in action from 18 February 1942 to 26 April 1942 with the Loknja Detachment and participated in the fighting in Nasswa [Nasva] on 22 February 1942, Saniki on 18 March 1942, and Rogowa [Rogova] on 25 March 1942" (Gov. Exh.37). Exhibit 42 is a certified copy of excerpts from the April 10, 1942, edition of the Latvian magazine "Laikmets," which includes a photograph of First Lieutenant Konrads Kalejs and an account by him of the attack "far behind bolshevik lines" in which General Stahlecker led Latvian "SS" troops, but was fatally wounded (Gov. Exh. 42).

Each of the exhibits described above has an attached certification that the original of the document was preserved in the

"Central State Historical Archive of the Latvian SSR," and the exhibits are otherwise certified in accordance with the requirements of 8 C.F.R. § 287.6. The Government also produced a forensic document analyst, Gideon Epstein, who was recognized by the immigration judge as an expert witness (Tr. at 596). Epstein testified that the signatures on exhibits 44 and 45, among others, were the same as the signatures on documents known to have been signed by the respondent (Tr. at 597-99, 649).

THE RESPONDENT'S TESTIMONY

At his deportation hearing, the respondent initially declined to testify on Fifth Amendment grounds (Tr. at 67-69); he ultimately waived his Fifth Amendment privilege, however, and gave testimony about his activities in Latvia during the

Nazi occupation (Tr. at 1138-40). The respondent also testified under oath about his war-time activities on March 1, 1984, when he was deposed by Jeffrey Mausner in Tampa, Florida (Gov. Exh. 17). [9]

RESPONDENT'S DEPOSITION

The respondent provided the following testimony at the March 1, 1984 deposition. He stated that he graduated from the military academy in Latvia in 1937, and that he then became a lieutenant in the Latvian Army (Gov. Exh. 17 at 19). He served with the Fifth Infantry Regiment of Cesis until

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[9] The respondent objected at the hearing to the admissibility of the deposition taken by Mausner, for which the respondent appeared without counsel (Tr. at 65-66). The immigration judge found that the March 1, 1984 deposition "was not coercive or otherwise conducted in violation of the respondent's due process rights" (i. j. dec. at 22 n.3). The respondent has raised no argument on appeal concerning the admissibility of this deposition. See United States v. Kirsteins, 906 F.2d 919 (2d Cir. 1990).

the Soviet occupation of Latvia in 1940 (Gov. Exh. 17 at 19-20). The respondent said that the Latvian Army was incorporated into the Red Army following the Soviet occupation of Latvia, and that he wore a Russian uniform during the period that he served in the Red Army (Gov. Exh. 17 at 33). He stated that when the Russians began to retreat from Latvia in 1941, he joined a self-defense unit in the forests of Litene, which is near Gulbene in the eastern part of Latvia (Gov. Exh. 17 at 25-27, 99). The chief of the self-defense unit was Colonel Aperats (Gov. Exh. 17 at 27, 99). The mission of the self-defense unit, according to the respondent, was to "guard and protect" Latvians from the retreating Russian soldiers who were "robbing and plundering" (Gov.Exh. 17 at 26, 62-63). The respondent testified that he was in Litene when the German Army entered

Latvia in the Summer of 1941 (Gov. Exh. 17 at 30).

The respondent stated further that the Germans abolished the self-defense units in Latvia, and that he made his way to Riga in the Fall of 1941 (Gov. Exh. 17 at 31). He then enrolled at the University of Riga, and he stated that he remained in Riga studying until January 1942 (Gov. Exh. 17 at 31-32). He also registered during this period at the Latvian Association Building in Riga, where Latvian officers were waiting to be mobilized (Gov. Exh. 17 at 102-03).

During the deposition, the respondent was shown copies of documents which he conceded he had submitted to officials at the University of Riga (Gov. Exh. 17 at 32-64; 3-1-84 Dep. Exhs. 6-10; Gov. Exhs. 44, 45, 23, 25, 74, respectively). Al-

though these certificates indicate that the respondent was serving as a first lieutenant and company commander in the Latvian Security Section, or Latvian Auxiliary Security Police, and although one of these certificates bore the signature of Viktors Arajs (3-1-84 Dep. Exh. 8; Gov. Exh. 23), the respondent maintained that he had not served in the "Arajs Kommando" (Gov. Exh.17 at 46, 64). He explained that he needed such certificates in order to prove to the university that he had been "helpful in the war effort" (Gov. Exh. 17 at 35-36). The respondent said that he accordingly obtained a certificate from the head of the auxiliary police in Gulbene, who advised that the respondent had belonged to a guerrilla unit "terrorizing" communists in late June and early July 1941 (Gov. Exh.17 at 59-60; 3-1-84 Dep. Exh.10; Gov. Exh. 74). The respondent

recalled that he needed to submit two certificates to the university, so, in addition to the certificate from the Gulbene police chief, he obtained a Security Police certificate from friends in Riga (Gov. Exh. 17 at 36, 44-45, 64). He added that he "needed two or less [certificates] each year" to provide to the university, so he obtained documents from friends in subsequent years attesting to his membership in the Latvian Security Section; he reiterated that he did not in fact serve in the Latvian Security Section, but merely obtained these certificates so that he could continue studying (Gov. Exh. 17 at 84-85; 3-1-84 Dep. Exhs. 7, 9; Gov. Exhs. 45, 25, respectively). The respondent also recalled that he switched his course of study at the university from engineering to economics and law, as reflected in a transfer request,

dated September 30, 1942, from "First Lieutenant Kalejs" to the Rector of the University of Riga (Gov. Exh. 17 at 34-35, 109; 3-1-84 Dep. Exh. 6; Gov. Exh. 44).

The respondent testified further that he did serve in a police unit at the front "under the command or under the authority of the German General, SS General Stahlecker" (Gov. Exh. 17 at 28, 46). When the respondent was asked why he did not obtain a certificate for the university from the unit that he said he was actually serving in, he explained that there was no Latvian in the unit from whom he could obtain a certificate, and he was unable to obtain a certificate from the Germans (Gov. Exh.17 at 46-47, 96-98). When the respondent was shown the hand-written note which bears the signature of "K. Kalejs," and which informs the registrar at the university of

Kalejs' position as a company commander in the Latvian Security Section, the respondent asserted that "[f]riends told me what to write" (Gov. Exh. 17 at 112-13; 3-1-84 Dep. Exh. 7; Gov. Exh. 45). He denied that he had served in the Latvian Security Police at any time (Gov. Exh. 17 at 83, 94-95).

The respondent testified that he did not find out who Arajs was until "long after [the] war" (Gov. Exh. 17 at 48). He stated later in the deposition that he could have met Arajs when they served in the Latvian Legion during the same period in 1944 or 1945 (Gov. Exh. 17 at 103-04). The respondent stated too that in November 1941, he did not know that the Jews were in a ghetto in one part of Riga; he did not know what Arajs was doing to the Jews; he did not know that Jews were shot at the Biker-

nieki and Rumbula Forests near Riga (Gov. Exh. 17 at 48-51). He added that he did not know that "Arajs Kommando" headquarters were located on Valdemara Street (Gov. Exh. 17 at 51-52). The respondent said that he had been to a summer army camp at Salaspils during the summers preceding the war; he was not at Salaspils during the war, and only learned after the war that there had been a concentration camp there (Gov. Exh. 17 at 64-65).

The respondent testified that the police unit which he did serve in was organized by the Germans, and the chief of the unit was General Stahlecker (Gov. Exh. 17 at 28). The respondent began serving as a company commander in the unit in January 1942 (Gov. Exh. 17 at 76, 104-05). He was the highest ranking Latvian officer in the police unit, and he oversaw "a special

unit of skiers" (Gov. Exh.17 at 28, 36-37). As a company commander within the police unit, the respondent reported directly to German officers (Gov. Exh. 17 at 107-08). The respondent said that the headquarters in Riga for his company, as well as for the "higher German police command," were located at 27 Raina Boulevard (Gov. Exh. 17 at 84, 95, 115-16).

According to the respondent, he went with his company to the eastern front in the beginning of 1942, in the area around Veliki Luki and Novo Sokolniki; he did not recall the village of Nasva (Gov. Exh. 17 at 28-30, 76). The respondent described an incident in which his company arrived on skis at a village where they encountered Russian resistance (Gov. Exh. 17 at 28-29, 82-83). General Stahlecker was wounded in the ensuing battle and died later; the

other German officers retreated when Stahlecker was wounded, and the respondent was left in command (Gov. Exh. 17 at 28-29, 80). The respondent said that his company was able to capture the village after a battle; his company then searched the village and found some Red Army soldiers who were turned over to the Germans as POWs (Gov. Exh. 17 at 80-81). The respondent denied that civilians in the village were executed as a reprisal for Stahlecker's wounding; he thought that some civilians might have been killed, though, during the battle (Gov. Exh.17 at 81-82). He added that the cities of Veliki Luki and Novo Sokolniki were "practically . . . [l]eveled . . . as a result of combat" (Gov. Exh. 17 at 77-78).

The respondent stated that he stopped serving as a company commander at "[t]he

end of 1942" because he developed an ulcer (Gov. Exh. 17 at 23, 106-07). He said that he resumed his studies at the University of Riga, and that he continued studying into 1944 (Gov. Exh. 17 at 108-09). The respondent testified that he was selected to be an officer in the Latvian Legion in 1943, but that he was able to delay his entry date due to his illness (Gov. Exh. 17 at 23, 106-07, 111). He lived for a while in Ventspils before he went to Germany in the Fall of 1944 to join the Latvian Legion; the respondent added that when he arrived in Germany, the Russians had already captured Riga (Gov. Exh. 17 at 110-11). The respondent served as a lieutenant in the Fifteenth "SS" Grenadier battalion of the Latvian Legion in 1944 and 1945 (Gov. Exh. 17 at 24). He said that his battalion was deployed in Latvia, but was constantly retreating; when the

respondent's ulcer began "acting up," he was put on a hospital ship and was taken to Germany (Gov. Exh. 17 at 24-25). The respondent stated finally that he lived in a displaced persons camp in Germany after the war,, and that at the camp he applied to immigrate to Australia (Gov. Exh. 17 at 11-12, 92).

RESPONDENT'S TESTIMONY AT HIS DEPORTATION HEARING

The respondent testified before the immigration judge on August 2nd and 3rd, 1988. He gave more details concerning his activities and whereabouts between 1940 and 1945 than he did during the March 1984 deposition. The respondent stated that during the period that he served with the Red Army in 1940 and 1941, he was the commander of a company which stayed temporarily at a parsonage in the village of

Nurmuiza, near Talsi, Latvia; the minister who resided there was named Pastor Namgauds (Tr. at 1141-42). In the Spring of 1941, the respondent's company left Nurmuiza, and was then deployed at Gulbene (Tr. at 1143). The respondent said that in June 1941, as the Russians were retreating eastward, he elected to remain in Latvia rather than go to the Soviet Union with the Red Army; the respondent added that he felt fortunate that he was allowed to remain behind, because many Latvian Army officers "were deported or killed" by the Soviet forces (Tr. at 1143-44).

The respondent joined a partisan unit near Gulbene in the first week of July 1941 (Tr. at 1144-45, 1228). He remained with the partisan unit for about a week, and then went with a group of former army officers toward Riga, fighting retreating

Russian troops along the way (Tr. at 1145, 1264-65). The respondent arrived in Riga in mid-July 1941 (Tr. at 1145). He said that he registered along with other Latvian officers at the Latvian Society Building on Merekela Street in Riga; he went to his family's summer home on the Baltic Sea while he was waiting to be mobilized (Tr. at 1145-46). He said that he also returned to Nurmuiza during July, August, and September of 1941, where he did farm work and assisted Pastor Namgauds with his church work (Tr. at 1146-47). After he returned to Riga, he worked as a manager in a clothing store for several weeks; because he still had not been called for duty, he decided to study at the university (Tr. at 1145-46).

The respondent testified that he started studying in the engineering department at

the University of Riga in October or November 1941 (Tr. at 1148, 1150-51, 1242). The respondent stated that in order to study at the university, he needed certificates to prove that he had been "fighting [the] Red Army," and protecting the Latvian people; he said that applicants who had served in "self-defense units" were given a preference at the university (Tr. at 1149, 1242-43). The respondent claimed that to acquire such a certificate, he sent a letter to the partisan chief near Gulbene (Tr. at 1149). While he was waiting for a response, he met a Sergeant Roze on a street in Riga; the respondent knew Roze because Roze had served under the respondent in the former Latvian Army (Tr. at 1149, 1243-44). The respondent testified that he observed that Roze was wearing some kind of a police armband, so he asked Roze if Roze could get him a police

certificate which would state that he had been "fighting [the] Red Army" (Tr. at 1149-50). Roze allegedly obtained such a certificate for the respondent, and the respondent submitted the certificate, along with the document from the partisan chief at Gulbene, to the university (Tr. at 1150). The respondent added that he acquired all of the certificates which he gave to the university between 1941 and 1943 from Roze; the respondent did not find out until later that Roze was serving in the "Arajs Kommando" (Tr. at 1243-44).

The respondent testified that his studies at the university were interrupted in January 1942, when a non-commissioned officer from his former company contacted him and told him that the Germans were looking for officers who had served in the Latvian Army to lead reconnaissance units

(Tr. at 1151). The non-commissioned officer introduced the respondent to the German General Schroeder, who interviewed the respondent about his experience in reconnaissance missions; the interview was held at the German headquarters on Raina Boulevard in Riga (Tr. at 1151, 1271). The respondent said that General Schroeder put him in charge of a reconnaissance unit which had already been organized and was being sent to the Russian Front (Tr. at 1152, 1250-51).

The respondent stated that his company travel led from Riga to the front first by train, and then by truck, at the end of January 1942; the company ultimately arrived at a village named Dno, but the company was not stationary (Tr. at 1152-54). The respondent testified that his company consisted of three platoons and

100 men; one of the platoon leaders was named Lieutenant Nadzins (Tr. at 1155). The company wore German uniforms with white camouflage overalls; the respondent wore silver epaulets with "two Latvian stars" on the collar and a Latvian flag on the arm (Tr. at 1167-68). He added that his company usually fought along with German troops (Tr. at 1157). The respondent stated that his commanding German officer was a "Wehrmacht general" who later succeeded Rommel in Africa (Tr. at 1169, 1245-46). According to the respondent, only about one third of his company at the front remained intact; the remainder were "either frozen or wounded" (Tr. at 1156). The company remained at the front until September or October 1942 (Tr. at 1154, 1228).

The respondent testified further that

the battle in which General Stahlecker was fatally wounded occurred in March 1942; he said that German companies, Latvian companies, and an Estonian company fought together in this battle (Tr. at 1157-58). The respondent could not recall the name of the village where this battle took place; he said that the village was located in the general area between Dno and Veliki Luki (Tr. at 1159-60). The respondent stated that his company continued fighting after Stahlecker was wounded, and that they took Russian prisoners after the battle was completed (Tr. at 1159-60). He added that although it was difficult to distinguish between Red Army soldiers and civilians during the battle, no civilians were deliberately killed, nor was the village burned (Tr. 1160-62, 1299-1301).

The respondent maintained that he was

never a member of the "Arajs Kommando," and that the company which he commanded in 1942 was not a part of the Latvian Auxiliary Police or subordinate to Viktors Arajs (Tr. at 1170, 1298). He stated that he could have met Arajs when they both were serving in the Latvian Legion, but that he did not have a personal relationship with Arajs (Tr. at 1170-71, 1212-13). The respondent stated too that his company did not serve at concentration camps or guard civilian prisoners; the respondent was only at Salaspils for "Army summer camp" before the Nazi occupation of Latvia (Tr. at 1171-72).

The respondent stated that he was relieved of command of his company in September or October 1942, when he suffered a stomach ulcer (Tr. at 1162, 1275). He was replaced by a German "Wehrmacht" officer

(Tr. at 1162-63, 1256-57). He said that he recuperated in a hospital administered by the Germans in Riga (Tr. at 1163). When he was released from the hospital, he resumed studying at the university, and also started doing farm work again in Nurmuiza, and in areas near Gulbene and Blavinas (Tr. at 1163). The respondent married in March 1943, and he and his wife lived with his parents at their apartment in Riga (Tr. at 1163-64, 1165-66). The respondent stated that in the period between his release from the hospital and his marriage, he spent half of his time doing farm work, and half of his time studying (Tr. at 1164). He testified that he studied at the university during the academic year of 1943, but that in the summer of 1943, he was working on farms (Tr. at 1165, 1296-97).

The respondent testified that he was contacted to report for service with the Latvian Legion in the Summer of 1944 (Tr. at 1166). After he was given a physical examination, he was ordered to report to Germany rather than to the front (Tr. at 1166). The respondent said that he went to Nurmuiza to care for his friends before he made his way to Germany (Tr. at 1166-67). He arrived in Germany on December 1, 1944 (Tr. at 1167, 1172). He joined the Fifteenth Grenadier Division of the Latvian Legion (Tr. at 1289-90). The respondent's division was deployed near Danzig, and the division was in training from December 1944 until January 1945 in preparation for a Soviet attack (Tr. at 1276). He claimed that part of the division's training in December 1944 and January 1945 involved farm work in the area around Danzig (Tr. at 1276-77). The respondent remained with

his division until April 1945, when he suffered a shrapnel wound to his knee and also got a concussion (Tr. at 1172, 1277-78). He was transported to Germany by ship, and was sent to Denmark after his wound healed; the respondent was in Denmark when the war in Europe ended on May 8, 1945 (Tr. at 1172).

The respondent stated that he remained in Denmark until 1947 (Tr. at 1172, 1279). He lived with his wife periodically when he was in Denmark; the respondent divorced his wife prior to his immigration to Australia (Tr. at 1241; Gov. Exh. 66). In late 1947, he moved to a displaced persons camp in Rotenburg, Germany (Tr. at 1173). The respondent said that he became the chief of police at the displaced persons camp (Tr. at 1175, 1279). He departed Germany for Australia in October 1950 (Tr.

at 1176-77).

On cross-examination, the respondent testified that in July 1941, when he went to the Latvian Society Building in Riga, he was responding to an announcement, aired on the radio and printed in the newspaper, calling Latvian Army officers to register (Tr. at 1260-62). He said that the name of the company which he commanded at the eastern front between January and the Fall of 1942 was the "Latvian Ski Company" (Tr. at 1246). He said too that his rank as company commander was "First Lieutenant" (Tr. at 1254-55).

The respondent testified further on cross-examination that he did not "serve" under General Stahlecker; he said that he was merely present at the battle on the eastern front in which Stahlecker was in command and later wounded (Tr. at 1216-

17). The respondent stated that otherwise he was not under the command of General Stahlecker (Tr. at 1216-17). He did not think that any newspaper or magazine would have reported that he was with Stahlecker when Stahlecker was wounded, because during wartime "it was forbidden to write names of persons or names of places" (Tr. at 1215). The respondent also stated that he received a "close combat" insignia from General Schroeder when the respondent returned to Riga in the Fall of 1942; the respondent said that he did not see General Schroeder again after he was awarded the insignia (Tr. at 1257-58, 1298). He did not know that Schroeder had been charged for war crimes in 1948 (Tr. at 1299).

The respondent maintained that during the period between September or October

1942 when he returned from the eastern front, and December 1944 when he joined the Latvian Legion, he was not involved in any military or police service (Tr. at 1228). He stated that during this 27 or 28 month period, he was studying and doing farm work (Tr. at 1228-29, 1233-34). The respondent testified that he received his "regular pay" from the Germans even though he was not performing military service, because he was "officially on sick leave" (Tr. at 1230). He explained that he had a physical examination when he returned from the front in the Fall of 1942, and that he had two subsequent physical examinations; he was found to be unfit for service at the front because of his ulcer (Tr. at 1231-32).

The respondent added that he had another reason, unrelated to his health, not to

perform military service when he returned from the front; he stated that he realized, as did many other Latvians, that the future which the Germans were planning for Latvia was "exactly opposite to our wishes and aspirations" (Tr. at 1229). He said that he was not in hiding, but that he had lost the will "to fight for the Germans" (Tr. at 1230, 1232). He stated too that it was easier for persons like himself, who held "official positions" in Latvia, to avoid military service with the Germans; the respondent "heard enough and knew enough to . . . try to avoid them" (Tr. at 1234-35).

The respondent testified that he did not receive a degree from

the university (Tr. at 1235). He said that he traveled the approximate 100 kilometers from Nurmuiza to Riga by train or truck

when he was alternately doing farm labor and studying (Tr. at 1235-36). The respondent testified that it was easy for him to get access to these means of transportation because he was an officer (Tr. at 1236-37). He stated that he wore parts of his Latvian Army uniform, or displayed a Latvian officer's certificate, in order to obtain permission to travel (Tr. at 1238, 1270). The respondent added that because of his "status as [a] former officer," he was able to carry as much food as he wanted when he was traveling back to Riga (Tr. at 1270).

The respondent stated finally on cross-examination that although he was in Riga in November and December 1941, he did not find out what happened to the Jews in Latvia until after the war (Tr. at 1304). The respondent did not know, at the time

it was constructed, that there was a ghetto for Jews in Riga (Tr. at 1305). He also did not see Jews being marched to the Rumbula Forest, or Jews in Riga on work details (Tr. at 1306). He did not find out what the "Arajs Kommando" was until after the war (Tr. at 1304).

I. RELIABILITY OF SOVIET DEPOSITIONS

The respondent's initial argument on appeal is a two-pronged attack against the procedure of taking depositions from witnesses in the Soviet Union. [10]The respondent contends first that the courts generally have found depositions in the Soviet Union to be an unfair method of securing evidence in war-crimes cases. He contends second that the depositions taken in his case were neither fair nor trustworthy. The respondent argues further that the

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[10] See note 5, supra.

Government deposition witnesses' identification testimony concerning him was inconsistent and unreliable.

A. Case Law Concerning Soviet Depositions

The respondent, relying on cases in which judges have discredited Soviet deposition testimony primarily because of the Soviet Union's political interest in such cases and the Soviet procurators' interference during the depositions, asserts that precedent cases support-the proposition that Soviet deposition testimony is inherently unreliable. The courts in some cases clearly have rejected Soviet deposition testimony as unreliable. In Laipenieks v. INS, 750 F. 2d 1427, 1432 (9th Cir. 1985), for instance, the Court noted that the Soviet procurator presiding over the deposition had referred to the petitioner as "the Nazi war criminal Laipe-

nieks," [11]and that the procurator had curtailed the right of Laipenieks' counsel to cross-examine the deposition witnesses. The Court concluded that this Board's reliance on the Soviet deposition testimony was error, because "Soviet involvement in the procurement of the deposition testimony seriously undermined its trustworthiness." Id. at 1433.

Similarly, in United States v. Kowalchuk, 571 F.Supp. 72 (E.D.Pa. 1983), aff'd en banc, 773 F.2d 488 (3rd Cir. 1985), cert. denied, 475 U. S. 1012 (1986), the trial court judge expressed considerable skepticism regarding the deposition testimony of Soviet witnesses. The judge began his discussion of the Soviet depositions

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[11] In United States v. Linnas, 527 F.Supp. 426, 434 n.16 (E.D.N.Y. 1981), aff'd, 685 F.2d 427 (2d Cir. 1982), cert. denied, 459 U.S. 883 (1982), the trial court judge also expressed his concern that the Soviet procurator had referred to Linnas, during the depositions, as the "Fascist prisoner murder[er]," and as "a former war criminal."

by observing that he did not believe that the witnesses' testimony was a fabrication, or that there was anything in the witnesses' demeanor which made their testimony unworthy of belief. 571 F.Supp. at 79. He nonetheless discredited the evidence because the Soviet government had selected the deposition witnesses, made them available to testify, and had the witnesses under its control. Id. The district court judge emphasized too that the right to cross-examine the witnesses had been restricted. Id. at 80. He accordingly declined to rely on the Soviet deposition testimony, but found evidence independent of that testimony which supported a denaturalization judgment.

In United States v. Kungys, 571 F.Supp. 1104 (D.N.J. 1983),

rev'd and remanded, 793 F.2d 516 (3rd Cir.

1986), rev'd and remanded, 485 U.S. 759, 108 S.Ct. 1537 (1988), the district court judge discussed at length the reasons he found the Soviet deposition testimony to be unreliable. He found that the Soviet Union had a strong state interest in implicating the defendant as a collaborator with the German occupation forces. 571 F. Supp. at

1123-26. He found further that the Soviet procurator limited or cut off defense counsel's cross-examination of the deposition witnesses. Id. at 1128-29. He found too that the interpreters at the deposition, supplied by the Soviet government, had skewed the witnesses' testimony in such a manner as to inculpate the defendant. Id. at 1129. The judge questioned the accuracy and legitimacy of the prior statements, or protocols, that the Soviet

witnesses had given, and he noted that the three deposition witnesses who implicated the defendant had executed additional protocols which the Soviet authorities never produced. Id. at 1130-32. The trial court judge therefore admitted the deposition testimony only for the limited purpose of establishing that certain killings in Lithuania had occurred. Id. at 1132.

In United States v. Kungys, 793 F.2d at 533, the United States

Court of Appeals for the Third Circuit reversed the district court's decision on the issue of whether the defendant had made a material misrepresentation to obtain his visa and subsequent naturalization. The Third Circuit did not specifically address the issue of the reliability of the Soviet deposition testimony taken in Kungys' case. Id. at 520; see also 108

S.Ct. at 1544. The Court nonetheless rejected "the suggestion that all depositions taken in the Soviet Union should be automatically excluded from evidence. " 793 F.2d at 520 n.2. The Court opined that a better approach would be, as with depositions taken in any other country, to assess the reliability of the evidence "on an individual basis." Id.

Other courts which have addressed the issue of Soviet deposition testimony have similarly rejected a per se rule of inadmissibility, even in cases where the Federal Rules of Civil Procedure are applicable. In United States v. Schuk, 565 F. Supp. 613, 615 (E.D.Pa. 1983), for example, the court dismissed as "premature and too speculative" a defense motion contending that depositions conducted in the Soviet Union would necessarily be so unre-

liable as to amount to a due process violation. Accord, United States v. Trucis, 89 F.R.D. 671 (E.D.Pa. 1981). In United States v. Palciauskas, 559 F.Supp. 1294, 1296-97 n.3 (M.D.Fla. 1983), aff'd, 734 F.2d 625 (11th Cir. 1984), the court admitted the deposition testimony of witnesses in Lithuania pursuant to Rules 26 and 28(b) Fed.R.Civ.P., [12]and relied on that testimony in part to establish that the defendant had been the Mayor of Kaunas, Lithuania, during the Nazi occupation. [13]In United States v. Kairys, 600 F.Supp. 1254 (N.D.Ill. 1984), aff'd, 782 F.2d 1374 (7th Cir. 1986), cert. denied,

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[12] Soviet deposition testimony was also admitted pursuant to Fed.R.Civ.P. 28(b) in United States v. Osidach, 513 F.Supp. 51, 89 n.22 (E.D.Pa. 1981).

[13] We note, however, that in Palciauskas v. INS, 939 F. 2d 963, 967 (11th Cir. 1991), the United States Court of Appeals for the Eleventh Circuit emphasized that it had expressed no opinion regarding the issue of the reliability of Soviet evidence in Palciauskas' prior denaturalization proceedings.

476 U.S. 1153 (1986), the defendant argued that the deposition testimony of witnesses in Latvia was unreliable due to the restrictions that were placed on the cross-examination of witnesses there. The court acknowledged that the restrictions on cross-examination would not be tolerated by courts in the United States, but ruled that this matter affected the weight to be accorded the evidence, rather than its admissibility. 600 F.Supp. at 1262. The ~~court~~ relied on the deposition testimony, corroborated by documentary evidence, to resolve the issue of the defendant's identity in Kairys. Id.

Still other courts have gone beyond merely admitting Soviet deposition testimony and have placed considerable reliance on it. In United States v. Koziy, 540 F.Supp. 25 (S.D.Fla. 1982), aff'd, 728

F.2d 1314 (11th Cir. 1984), cert. denied, 469 U.S. 835 (1984), deposition testimony was taken from witnesses in Poland and the Soviet Union who identified the defendant as a Ukrainian policeman during the Nazi occupation. Despite defense counsel's nonappearance at the depositions, which resulted in the deposition witnesses not being subjected to cross-examination, the court found the witnesses' photographic identification of the defendant to be "reliable when considering all of the circumstances. " 540 F.Supp. at 31 n.13.

In United States v.Linnas, 527 F.Supp. 426 (E.D.N.Y. 1981), aff'd, 685 F.2d 427 (2d Cir. 1982), cert. denied, 459 U.S. 883 (1982), the district court judge admitted into evidence the deposition testimony of four Soviet witnesses who identified Linnas as the former chief of a concentra-

tion camp in Estonia. Defense counsel refused to attend the depositions and argued that all Soviet-source evidence should be excluded as unreliable. 527 F.Supp. at 433-34. In rejecting this contention, the court emphasized that Linnas had not demonstrated one instance in which fraudulent evidence had been submitted by the Soviet authorities to a western court. Id. The district court judge found the deposition witnesses to be credible, used the deposition testimony to corroborate the documentary evidence against the defendant, and entered an order revoking Linnas' United States citizenship.

In United States v.Osidach, 513 F.Supp. 51 (E.D.Pa. 1981), appeal dismissed on defendant's death, No.81-1956 (3rd Cir., July 22, 1981), the court also relied on Soviet deposition testimony to support a

denaturalization judgment. [14]The defendant based his objection to the admission of the depositions on the presence of the Soviet procurator, the inadequacy of the oath administered to the Soviet witnesses, and the translation offered by the Soviet-supplied interpreters. Id. at 89-90 n.22. The court, noting that the Soviet Union would not have allowed the depositions to take place without its procurator being present, "ruled that "the procuring of videotaped deposition testimony of Soviet eyewitnesses outweigh[s] the concerns expressed by Osidach." Id. at 89 n.22. The court found too that there was no indica-

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[14] The respondent submits in his brief that the value of the Osidach decision as precedent is diminished because the defendant died before his appeal could be considered. Osidach's appeal would have been adjudicated by the Third Circuit, however, which suggested in United States v. Kungys, 793 F.2d at 520 n.2, that the reliability of Soviet deposition testimony should be assessed on a case-by-case basis. The district court judge in Osidach gave a thorough and well reasoned explanation for his acceptance of the Soviet deposition testimony. United States v. Osidach, supra, at 89-90 n.22.

tion that Osidach had been prejudiced by the procurators' presence at the depositions, because their involvement in the depositions was "virtually nonexistent." Id. Concerning the argument that the deposition witnesses were not administered an adequate oath, the court found that "the deponents clearly understood that they were required to tell the truth." Id. at 90 n.22. The court opted to disregard the portions of the depositions where there was a dispute regarding the translation. Id. As a final "precautionary step," the court looked to independent, corroborative evidence prior to placing reliance on the Soviet deposition testimony. Id.

The precedent cases discussed above reflect that there is no per se rule of inadmissibility for Soviet deposition testimony in the federal courts. In view

of the federal courts' decisions not to adopt an approach of categorical exclusion for Soviet deposition testimony, we see no reason to prejudge the deposition testimony in the instant case as inherently unreliable. There is no Board precedent, or federal precedent binding in this case, which holds that the use of Soviet deposition testimony is so fundamentally unfair that it deprives an alien of due process of law.

We find that the most prudent approach to this question of the reliability of Soviet deposition testimony is to examine carefully the particular circumstances surrounding the depositions before determining the weight to be given the deposition testimony. See United States v. Kungys, 793 F.2d at 520 n.2. As a part of this examination, all of the factors dis-

cussed in the above cases should be analyzed: evidence of Soviet political interest in a case; restrictions, if any, placed on cross-examination during the depositions; the availability of the deposition witnesses' prior statements; the degree of interference or impropriety on the part of the Soviet procurator during the depositions; the accuracy of the translation of the testimony of the deposition witnesses; the extent of corroborative evidence available to substantiate the deposition testimony; and any other factors which may be indicative of the reliability of the deposition testimony. After thorough consideration of the foregoing factors, as well as an evaluation of the testimony of the individual witnesses, an overall assessment of the reliability of the Soviet deposition testimony can then be made. With these considerations in

mind, we turn to a review of the deposition testimony taken in the respondent's case.

B. Reliability of the Soviet Depositions in the Respondent's Case

As noted above, the immigration judge found the Soviet deposition testimony to be reliable. He summarized the testimony of the deposition witnesses, and stated that "[t]he 'weight accorded to the testimony of each deponent has been judged individually" (i.j. dec. at 5). After reviewing all of the factors surrounding the depositions, we find no error in the immigration judge's decision to accord weight to the testimony of the Soviet deponents.

The first of the foregoing factors which we will consider in assessing the reliability of the Soviet deposition testimony

is the evidence of Soviet political interest in these proceedings. The respondent did not present witnesses at his hearing to testify on the issue of Soviet political interest in his case. Cf. United States v. Kungys, 571 F.Supp. at 1124-26. The respondent has summarized the testimony of such witnesses from prior proceedings, however, and he has cited articles and Soviet publications which, he contends, indicate that the Soviet Union had a strong state interest in depicting the respondent as a Nazi collaborator. Moreover, the respondent urges generally that the issue of Soviet-source evidence should be viewed in the context of the United States' distrust of Soviet policy during the Cold War Era. Respondent's brief at 9-10. While the possibility of, in the respondent's words, "Soviet treachery" cannot be overlooked or ignored, the fact

remains that there is no indication in this record that the testimony of the deposition witnesses was fabricated, or that the documentary evidence concerning the respondent is fraudulent. Accordingly, we choose to scrutinize the evidence in the record concerning the respondent's deportability, rather than to presume that the evidence which has a Soviet source is unreliable.

The next factor which is an important indicator of the reliability of the Soviet deposition testimony is the opportunity that the respondent was given to cross-examine the Soviet witnesses. The record reflects that respondent's counsel was able to question the Government deposition witnesses on cross-examination about such matters as bias and improper motivation, prior interrogations conducted by the

Soviet authorities, and any prejudicial materials that the witnesses may have read about the respondent in the post-war period. Respondent's counsel also was able to challenge the credibility of the Government deposition witnesses by questioning them on cross-examination.

The respondent asserts that the procurator interfered with his cross-examination in several instances. The respondent alleges that the procurator interfered with the respondent's cross-examination of Soms, Putnins, and Rozkalns, when the procurator informed these witnesses that they need not answer any question that was damaging to their dignity. Respondent's brief at 25-26. The procurator informed the witnesses of this "dignity" privilege, however, when the subject of punishment for their own war-time activities arose.

Soms, Putnins, and Rozkalns each ultimately stated that they had been punished for their war-time activities, and the procurator's mention of the "dignity" privilege did not meaningfully interrupt the witnesses' testimony about previous occasions in which they had been interrogated concerning Kalejs. The respondent also objects to the procurator's "instructing [Ennitis] not to answer a question pertaining to the conditions at Salaspils." Respondent's brief at 26. The procurator actually precluded Ennitis from contrasting conditions at Salaspils with conditions at the Soviet labor camp where Ennitis was later incarcerated; there was no restriction placed on respondent's counsel in questioning Ennitis about conditions particular to Salaspils.

The respondent has otherwise not identi-

fied any matters which he was precluded from raising while cross-examining the Government witnesses at the depositions. The scope of cross-examination of the Government witnesses appears to have been broader in the instant case than in cases where Soviet deposition testimony was rejected as unreliable in part because of restrictions on cross-examination. See United States v. Kungys, 571 F.Supp. at 1128-29; United States v. Kowalchuk, 571 F.Supp. at 80.

The respondent submits, however, that his right to cross-examine witnesses was infringed because not all of the prior protocols of the witnesses were produced. The record reflects that in his November 12, 1986, decision authorizing the Riga depositions, the immigration judge instructed the Government to make the prior

written statements of the Government's proposed witnesses available to the respondent 60 days prior to thee parties' departure to attend the depositions (Gov. Exh. 5A at 4). The record reflects further that on March 17, 1987, the Government issued to the respondent prior protocols of witnesses Soms, Strazds, Putnins, and Rozkalns (Gov. Exh. 8). The Government also provided the respondent, prior to the depositions, a copy of the judgment in Viktors Arajs' criminal case, which included summaries of the testimony of former "Arajs Kommando" members (Gov. Exhs. 8, 22). [15]Prior protocols of Government deposition witnesses Bahsteins, Ennitis, and Pimanis were made available to the respondent at the Riga depositions. The

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[15] All of the respondent's deposition witnesses, Jurgitis, Kalnins, Murnieks, Karklins, Elins, and Jansons, appear to have been witnesses as well at the Arajs trial. Gov. Exh. 22 at 48-50, 73-77.

Government asserts, and there is no indication in the record to the contrary, that it made available to the respondent all protocols which it received from Soviet authorities. Government's brief at 34 n.26.

The Government deposition witnesses indicated in their testimony that they had previously signed protocols, which were not produced at the depositions or thereafter, following interrogation sessions with the Soviet authorities. Some of the Government deposition witnesses indicated that Kalejs' name had been mentioned in these interrogation sessions (Soms, Strazds, Bahsteins, and Rozkalns), while others said that his name had not been mentioned (Ennitis and Pimanis). [16]The

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[16] The remaining Government deposition witness, Putnins, testified that he had only been interrogated about Kalejs in 1985 (Gov. Exh. 84 CT at 54). Putnins' 1985 protocol was provided to the

respondent now argues that without the missing protocols, he could not fully exercise his right to cross-examine the witnesses. Respondent's brief at 32-35.

The respondent argues further that the prior protocols of the

witnesses whom he requested to depose ought to have been produced. The respondent, however, had no right to the production of the prior protocols of his own deposition witnesses. [17]These witnesses appeared solely at the request of the respondent, and we do not find that due process requires the production of prior statements made by witnesses the Government would not have called. We note too

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respondent prior to the Riga depositions (Gov. Exh. 8).

[17] The Government nevertheless turned over to the respondent the protocols of the respondent's witnesses which it had received from the Soviet authorities. See Government's brief at 33.

that there is no right to discovery in deportation proceedings, where the Federal Rules of Civil Procedure are inapplicable.[18] Matter of Kulle, 19 I&N Dec. 318, 335 (BIA 1985), aff'd, Kulle v. INS, 825 F.2d 1188, 1194 (7th Cir. 1987), cert. denied, 484 U.S. 1042 (1988); Matter of Benitez, 19 I&N Dec. 173, 174 (BIA 1984); Matter of Magana, 17 I&N Dec. 111, 115 (BIA 1979). Concerning the Government deposition witnesses, the issue reduces to whether the absence of their prior protocols deprived the respondent of his right to cross-examine witnesses pursuant to section 242(b) of the Act, 8 U.S.C. § 1252(b), and 8 C.F.R. § 242.16(a).

We find that the nonproduction of the

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[18] Respondent's counsel conceded twice on the record that he did not have a discovery right to the prior protocols of the respondent's deposition witnesses (Gov. Exh. 88CT at 21; Gov. Exh. 91CT at 28).

earlier protocols of the Government deposition witnesses did not result in an impermissible infringement on the respondent's right to cross-examine witnesses presented against him. There is no basis in the record to conclude that the earlier protocols now exist, or that, assuming they do exist, their production would have assisted the respondent in his cross-examination of the witnesses in any meaningful manner. Many of the Government deposition witnesses testified that they had been interrogated shortly after the war, or in the 1950s. If protocols from this period could be produced, the respondent clearly would have the opportunity to test the present recollections of the witnesses against their former statements, rendered at a time when their recall would have been sharper. However, to the extent that the Government deposition witnesses were

able to recall their prior interrogations and written statements, their testimony was not clear as to whether the respondent was the specific subject of these interrogations. Thus, there is no firm indication that the contents of any earlier protocols would have aided the respondent's efforts to impeach the Government deposition witnesses.

Moreover, the Government gave the respondent many protocols and other materials, prior to the Riga depositions, to bassist him in his cross-examination of the witnesses. The respondent does not claim that the Government withheld any protocols which may have been favorable to the respondent's defense.

We also find that there is a significant distinction between the instant case and United States v. Kungys, 571 F.Supp. at

1131, wherein the trial court judge expressed his concern that the only protocols provided to the defendant were those executed after the commencement of "the investigation being conducted by the OSI and the Soviet authorities." By contrast in this case, the respondent was provided with protocols made in 1975 by Strazds, arguably the Government's most important deposition witness; there is no information in the record which indicates that the Government had commenced an investigation against the respondent in the 1970s.

Finally, we emphasize again that the respondent had full opportunity to test the recollections of the Government deposition witnesses when he questioned them on cross-examination. We therefore conclude that the absence of earlier protocols did not violate the respondent's

right to cross-examine witnesses. See Kulle v. INS, supra, at 1194 (in deportation proceedings, "the right to cross-examine is not unlimited"). We further conclude that the cross-examination procedure employed in this case does not require that the Soviet deposition testimony be regarded as unreliable.

The next factor which we will address as a means to the end of assessing the reliability of the Soviet deposition testimony is the Soviet procurator's conduct during the depositions. The respondent contends that the procurator "made no pretense of trying to be fair or impartial." Respondent's brief at 24. The respondent objects to the procedure in which the procurator questioned the deposition witnesses. The respondent also objects to the content of the questions which the procurator posed;

the respondent asserts that the procurator framed his questions in such a way that the witnesses' responses were an inseparable mixture of hearsay and their own recollections.

The record reflects that the procurator did begin the depositions by questioning the witnesses himself. His examination of the witnesses, however, was of brief duration as compared to the parties' examination of the witnesses. Moreover, the parties were permitted to raise the same questions with the witnesses as the procurator had, in order to clarify the witnesses' answers. Where the witnesses' testimony was based on hearsay, the respondent had the opportunity to cross-examine the witnesses and attempt to identify the source of the witnesses' hearsay statements. Upon our review of the procu-

rator's questioning of the deposition witnesses, we find that this procedure did not evince an impartiality against the respondent.

Despite the respondent's complaints about procurator interference, a review of the record reveals that there were instances during the depositions when the procurator actually helped the respondent's case. For example, during the deposition in which Strazds gave a non-responsive answer to a question from respondent's counsel about Arajs' physical characteristics, the procurator informed Strazds' that Strazds should respond to the question regardless of whether Strazds thought it was a "silly question" (Gov. Exh. 83CT at 121). The record also reveals that during the Soms deposition, when Government counsel sought to remove the

paper strip which concealed the names beneath the photographs on respondent's deposition exhibit nineteen, the procurator agreed with respondent's counsel that the paper strip ought not be removed (Gov. Exh. 81CT at 89-90).

As part of his argument regarding the procurator's conduct at the depositions, the respondent claims that "[i]t was painfully obvious" that Government deposition witness Putnins had been intimidated by the Soviet authorities. Respondent's brief at 26. Yet Putnins, during his deposition, disavowed a prior protocol in which he had stated that Kalejs was a company commander of a guard unit at Salaspils; Putnins stated at the deposition that he had no direct knowledge that Kalejs had been at Salaspils, but that he had heard this from his wife, the respondent's sister (Gov.

Exh. 84CT at 51). Putnins' willingness, in the procurator's presence, to distance himself from a protocol incriminating the respondent is difficult to reconcile with the respondent's claim that Putnins had been intimidated. Cf. United States v. Kungys, 571 F.Supp. at 1131 ("The various witnesses would have had to have had extraordinary courage to disavow any statement contained in a protocol"). [19]Based upon our review of the procurator's conduct at the depositions, we find that he did not interfere in such a manner so as to render the Soviet deposition testimony unreliable.

The next factor relating to the reli-

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[19] During Bahsteins' deposition, Bahsteins similarly retreated from a prior protocol. While Bahsteins' protocol contained statements that Kalejs was among the first to join the "Arajs Kommando," and that Kalejs was on friendly terms with Arajs, Bahsteins informed the procurator that he had only heard these things from soldiers (Gov. Exh. 89CT at 47).

ability of the Soviet deposition testimony is the accuracy of the translation provided. The videotapes of the depositions reveal that respondent's counsel, who is fluent in Latvian, questioned the deposition witnesses in their native Language. Respondent's counsel accordingly was in a good position to note any inaccurate translation of the witnesses' testimony. In addition, the record reflects that the parties were given the opportunity to review the accuracy of the transcripts of the depositions, and to make corrections before the transcripts of the deposition testimony were admitted into evidence (Tr. at 1197-1201; Gov. brief at 35 n. 27). Under these circumstances, the translation of the deposition witnesses' testimony appears to have been an entirely reliable process.

The next factor with regard to the issue of the reliability of the Soviet deposition testimony is the existence of corroborative evidence which substantiates the testimony of the deposition witnesses. We will discuss the corroborative evidence, which consists mainly of documentary evidence and the respondent's own testimony, in the following section regarding the respondent's deportability under section 241(a)(19). Although we have completed our analysis of the reliability factors enumerated above, we note that the respondent has several remaining arguments concerning the reliability of the Soviet deposition testimony.

The respondent argues that the Soviet witnesses should have come to the United States in order to present their testimony. In his decision authorizing the Riga

depositions, the immigration judge found that the Soviet witnesses were not available to testify at the respondent's deportation hearing (Gov. Exh. 5A at 2). The respondent has specified on appeal six deposition witnesses whom he believes could have come to the United States, "but for Soviet chicanery." Respondent's brief at 17-18. The six witnesses whom the respondent mentions, Soms, Jurgitis, Putnins, Bahsteins, Jansons, and Rozkalns, all cited medical reasons as the basis for their unwillingness to travel to the United States. At the time that the Riga depositions were held, the ages of these witnesses ranged from a 63-year-old (Bahsteins) to a 75-year-old (Rozkalns). There is no indication in the record that the reasons offered by these witnesses for their inability to travel abroad were illegitimate. We note too that Putnins and

Rozkalns specifically testified that they had been contacted by the Soviet authorities and asked whether they would be willing to go the United States to testify (Gov. Exh. 84CT at 54-55; Gov. Exh. 92CT at 66, respectively). We find no error in the immigration judge's finding that the Soviet witnesses were unavailable for the respondent's hearing. [20]

The respondent argues alternatively that if the witnesses had to be deposed in the Soviet Union, the depositions should have been held at a United States Consulate. As

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[20] As support for his argument about the availability of the witnesses, the respondent has proffered evidence of agreements between the Soviet Union and the nations of Canada and Australia. The respondent asserts that the governments of Canada and Australia reached agreements for handling war-crimes investigations with the Soviet Union which would have resulted in less Soviet intrusion in the proceedings. Respondent's brief at 17. The evidence of these other agreements, of course, affords the respondent no rights in the instant proceedings. Moreover, we note that it is not at all clear that proceedings conducted in accordance with the evidence of agreements which the respondent has proffered would result in any practical differences from the proceedings conducted here.

the Government emphasizes, however, the respondent did not make this request before the immigration judge. Government's brief at 62. [21]The immigration judge accordingly did not address this issue in his November 12, 1986, order authorizing the depositions. A request regarding the location of depositions held abroad is obviously of little use after the depositions have taken place. As we stated in Matter of Garcia-Reves, 19 I&N Dec. 830, 832 (BIA 1988), "objections . should be made on the record, or such objections will not be preserved for appeal." We find that the respondent waived his request

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[21] In a reply brief, the respondent counters that this issue was raised with the immigration judge because the respondent, in his motion papers dated September 22, 1986, called to the attention of the immigration judge a federal court decision authorizing the taking of depositions at a United States Consulate. Respondent's brief dated 7-31-89, at 5. A review of the respondent's motion reveals, though, that he made no specific request in his pleadings that the depositions be held at a United States Consulate (Gov. Exh. 5A).

that the depositions be held at a United States Consulate by not properly bringing this request to the attention of the immigration judge.

The respondent also submits that he was deprived of a fair hearing because his requests for archive and site visits were denied. Respondent's brief at 20-23. The record reflects that the immigration judge ordered the Government to pass on to the Soviets the respondent's request for an archives visit, but the immigration judge did not require that the Government relay the respondent's request that he be permitted to visit the sites where he is alleged to have been involved in atrocities (Gov. Exh.5A at 4). The respondent's arguments concerning archive and site visits are based in part on the rules regarding discovery in the Federal Rules

of Civil Procedure, which, as noted above, are inapplicable in deportation proceedings. Matter of Kulle, supra; Matter of Benitez, supra; Matter of Magana, supra. Moreover, even in cases where the Federal Rules of Civil Procedure do apply, the admissibility of Soviet evidence has not been conditioned on Soviet-archive visits. In United States v. Kairys, 600 F.Supp. at 1261, the Court found to be admissible a document that "was properly certified as coming from the Soviet archives," although no inspection of the Soviet archives appears to have occurred in that case. See also United States v. Kairys, 782 F.2d at 1378 n.7, and 1380. With respect to his other request, the respondent has not adequately explained how visits to sites where atrocities may have occurred 45 years prior to the depositions would have materially assisted him in preparing for

the testimony of the witnesses against him. [22]See United States v. Kowalchuk, 773 F.2d at 497. We conclude that the respondent had no "discovery" right to archive and site visits, and that, in any event, he has not demonstrated how such visits would appreciably have bolstered his preparation of a defense.

The respondent argues too that according to Soviet law, the Soviet authorities had to commence a criminal investigation against Kalejs if the authorities received any information that he had committed a crime under Soviet law. The respondent states that if such a criminal investigation was commenced, he should have been provided with a copy of the investigatory

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[22] We note too that considering our finding below that the respondent's alleged participation in the destruction of a village did not establish his deportability under section 241(a) (19) of the Act, the denial of a visit to this site caused him no prejudice. See pages 39-40, infra.

files. We find no merit to this argument. First, although the respondent raised this matter with the procurator during the Soms deposition, there is positively no indication from the exchange between respondent's counsel and the procurator that the Soviet authorities had commenced a criminal investigation against Kalejs (Gov. Exh. 81CT at 61-62). Second, the respondent's request for evidence in this connection is but another camouflaged request for discovery in deportation proceedings.

The respondent further alleges that Government counsel asked their deposition witnesses leading questions, and invited them to recite hearsay testimony. He also argues that Government counsel, while cross-examining the respondent's deposition witnesses, went beyond the scope of matters raised by the respondent on direct

examination by prompting the witnesses, and eliciting hearsay testimony from them. Respondent's brief at 26-27. Hearsay evidence is admissible in deportation proceedings, however, and thus the respondent's objections concerning any hearsay testimony from the deposition witnesses go to the evidentiary weight to be given that testimony. See, e.g., Matter of Grijalva, 19 I&N Dec. 713 (BIA 1988). As we observed with the respondent's argument about the procurator's tendency to elicit hearsay testimony, the respondent had the opportunity on cross-examination or redirect examination to identify the origins of the witnesses' hearsay knowledge, and thereby guard against the risk that too much weight might be given to hearsay testimony. Moreover, we have reviewed

the specific passages of testimony about

which the respondent complains, and we do not find a pervasive practice of Government counsel asking the witnesses leading questions such that the witnesses' answers were not spontaneous. Cf. United States v. Kungys, 571 F.Supp. at 1128 ("The government attorneys persisted time and again to pose blatantly leading questions").

Accordingly, based upon our review of all the circumstances surrounding the Riga depositions, we find that there are sufficient indicia of reliability to conclude that the immigration judge did not err in relying on the deposition testimony as evidence of the respondent's deportability. [23]We furthermore conclude that the procedures followed during the depositions, as authorized by the immigration

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[23] An individual assessment of the deponents' testimony whom the immigration judge relied on in finding the respondent deportable under section 241 (a)(19) of the Act will be conducted below.

judge's November 12, 1986, order (Gov. Exh. 5-A), did not deprive the respondent of due process of law.

C. Reliability of the Identification Testimony

The respondent submits that the identification testimony of the Government deposition witnesses was unreliable and unworthy of evidentiary weight. He argues that the procedure whereby the Government deposition witnesses were shown photographs of Kalejs was improper, and that the resulting identifications were unreliable. He argues too that the Government deposition witnesses' physical descriptions of Kalejs were conflicting.

The record reflects that during their depositions, Soms, Strazds, and Rozkalns confirmed their prior photographic identifications of Kalejs (Gov. Exh. 81CT at 53-

54, Gov. Exh. 83CT at 157-58, Gov. Exh. 92CT at 23-25, respectively). The respondent charges that these photographic identifications were unreliable because they occurred prior to the parties' arrival in Riga for the depositions, and because they were "carried out by the Soviets in their own fashion unseen by any Western eyes." Respondent's brief at 29. The respondent's claim that these witnesses received "training" in the art of photo identification" is not supported by any evidence in the record. [24]

The respondent asserts that the photospreads shown to Soms, Strazds, and Rozkalns were suggestive because, of the eight photographs in the spread, two were

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[24] We find unpersuasive the respondent's references to a "Freudian slip" in Soms' testimony, and an "improper translation" of Rozkalns' testimony, as evidence that the Soviet authorities "coached" the witnesses before their photographic identifications. Respondent's brief at 29-30.

of Kalejs. The two photographs of Kalejs were not duplicates, however, and we do not consider their usage to have rendered the display invalid. See United States v. Hamilton, 792 F.2d 837, 840 (9th Cir. 1986). We also find no merit to the respondent's contention that Strazds' photographic identification of the respondent conflicts with Soms and Rozkalns, since Strazds selected only one photograph in the spread, whereas Soms and Rozkalns placed their initials under two photographs. [25]Strazds' ability to select one photograph of the respondent is probative of the issue of his ability to recall Kalejs, regardless of his failure to identify the remaining photo of Kalejs in the same spread. Considering all of the cir-

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[25] The respondent offers no insight as to why such a discrepancy would exist if Strazds, Soms, and Rozkalns had all been "coached" concerning which photographs to select.

cumstances of these photographic identifications, we are not persuaded that the photospreads were impermissibly suggestive, or that the witnesses' identifications were otherwise unreliable. See United States v. Kairys, 600 F.Supp. at 1261-62; United States v. Koziy, 540 F.Supp. at 31 n.13; see also United States v. Linnas, 527 F.Supp. at 431-32.

Moreover, we find that any lingering doubt regarding the reliability of the deposition witnesses' photographic identifications was removed following the respondent's presentation of his own photographic exhibits at the depositions. During the Soms deposition, respondent's counsel presented a series of photographs to Soms to see whether Soms could identify anyone in the photographs. Soms reviewed 240 yearbook-size pictures before pointing

to a photograph which, he said, could be Kalejs. [26]Respondent's counsel insisted that the paper strips covering the names of the persons in his photographic exhibits not be removed. Strazds subsequently identified a photograph, which he believed to be of Kalejs, on respondent's deposition exhibit nineteen. Ennitis was also shown respondent's deposition exhibit nineteen, but he did not recognize anyone in the photographs.

At the respondent's deportation hearing, the Government introduced into evidence a reproduction of a book containing photographs of the 1937 graduating class of the Latvian Military Academy (Gov. Exh.108).

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[26] The respondent argues that Soms' identification of the photograph on respondent's deposition exhibit nineteen was equivocal. While Soms did not state with absolute certainty that the photograph which he selected was of Kalejs, we find that, in the context of reviewing 240 small photographs, Soms evidenced a distinct recognition of a photograph of the respondent. See Gov. Exh. 81A at 19:13:30 to 19:20:40; Gov. Exh. 81CT at 74.

The immigration judge's acceptance of this exhibit followed the respondent's willingness to reveal only that he obtained the photographs for his deposition exhibits "from a collector of photographs" (Tr. at 1358). The immigration judge

found that the photographs in respondent's deposition exhibit nineteen corresponded to the photographs on page 35 of the Latvian Military Academy book "Kadets" (i.j. dec. at 33).

The respondent now argues that "clear, convincing, and unequivocal" evidence does not support the immigration judge's correlation of the photographs in respondent's deposition exhibit nineteen with the photographs in "Kadets," which includes a photograph of Konrads Kalejs (Gov. Exh. 108 at 35). The respondent's argument is untenable. First, we note that respon-

dent's counsel apparently would have revealed the names of the persons in his photographic exhibits only in the event that Soms and the other deposition witnesses had failed to recognize any of the photographs. The respondent cannot abuse his right to present evidence by submitting photographic evidence subject to the condition that the evidence has an exculpatory effect. Cf. United States v. Ziegler, 583 F.2d 77, 80 (2d Cir. 1978) (prosecution may submit inculpatory evidence on a conditional basis only where that evidence is subsequently linked to the accused). Second, the immigration judge's acceptance of the "Kadets" reproduction (Gov. Exh. 108) followed the respondent's unwillingness to divulge, in a meaningful way, the source of his photographic exhibits. Under these circumstances, we find no error in the immigration

judge's finding that respondent's deposition exhibit nineteen included a photograph of the respondent.

The respondent attacks the reliability of Soms and Strazds' identification of the photograph in respondent's deposition exhibit nineteen by claiming that Soms generally may have been "coached" on how to identify photographs of Kalejs, and that, because Strazds succeeded Soms at the depositions, Strazds may have been told which photograph to select. These arguments are meritless. Concerning Soms' identification of the photograph presented by respondent's counsel, the respondent vacillates between arguing that Soms did not unequivocally identify the respondent, and arguing that Soms had been "coached" on how to identify photographs of the respondent. As to the accusation that

Strazds was told, presumably by the Soviet authorities, which photograph to select, the respondent overlooks the significance of Ennitis' failure to recognize a photograph on respondent's deposition exhibit nineteen. The respondent would have us believe that, following Soms' selection of a photograph on respondent's deposition exhibit nineteen, the Soviet authorities told Strazds which photograph to select, but they did not tell Ennitis, who also was deposed subsequent to Soms. [27] Considering all the circumstances of Soms and Strazds' photographic identification of the respondent in the respondent's deposition exhibit nineteen, we find no error in the immigration judge's conclusion that their identifications of the respondent

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[27] Ennitis' explanation for his failure to recognize any photographs was that he had a poor memory for faces, but that he was able to recall people better when he heard their voices (Gov. Exh. 90CT at 61-62).

were reliable. Moreover, we find that the photographic identifications of these deposition witnesses contributes to the reliability of their testimony concerning the respondent.

The respondent also argues that the Government deposition witnesses gave conflicting physical descriptions of Kalejs, and that these conflicts render their testimony unreliable. The immigration judge did not attribute significant weight to the discrepancies in the witnesses' testimony about Kalejs' physical characteristics (i.j. dec. at 33). Nor do we.

We observe initially that the respondent makes repeated reference to a "Kalejs" in connection with this argument, implying that the witnesses were describing the physical characteristics of someone other than the respondent. There is no indica-

tion in the record, and the respondent submitted no evidence to establish, that there was more than one "Kalejs" in the "Arajs Kommando" during the Nazi occupation of Latvia, let alone more than one "Arajs Kommando" officer named "Kalejs." Moreover, we are satisfied from our review of the documentary evidence in the record, which will be analyzed below, that the respondent did serve in the "Arajs Kommando." We therefore find no merit to the respondent's implication that there is a mistaken-identity issue in this case.

The respondent contends that in 1941, he was 5' 8" tall, weighed 73.5 kilograms, and had blond hair. Respondent's brief at 36. This description is consistent with the information in the respondent's application for an immigrant visa, executed in 1958, with one important exception. The

respondent's application for an immigrant visa reflects that he was 5' 8" tall (1.74 meters), weighed 160 pounds (72.7 kgs.), had blue eyes, but had brown hair (Gov. Exh. 16). [28]The respondent argues that inconsistencies in the deposition witnesses' testimony about the color of Kalejs' hair reveal that their testimony was unreliable. Considering that these witnesses, for the most part, were recalling Kalejs as he would have appeared in uniform with headgear, the significance of hair color as an identifying characteristic is diminished. Nonetheless, the majority of the Government deposition witnesses did state that Kalejs' hair was dark, rather than "blond" as the respondent now claims.

We similarly find unpersuasive the

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[28] We are satisfied that the information in the visa application (Gov. Exh. 16) relates to the respondent. See note 42, infra.

respondent's charge that the Government deposition witnesses' conflicting descriptions of Kalejs' uniform are significant. The Government's expert witness, Dr. Hilberg, testified that members of the "Arajs Kommando" wore different types of uniforms during the Nazi occupation of Latvia (Tr. at 150-51). Some of the deposition witnesses recalled that the "Arajs Kommando" members' did not all wear the same uniforms (e.g., Jurgitis, Gov. Exh. 82CT at 41-42; Jansons, Gov. Exh. 91CT at 13). The respondent also testified that he had worn different kinds of uniforms during the war (Gov. Exh. 17 at 33, 55-56). Thus, since the witnesses did not necessarily observe the respondent in the same uniform, we do not accord significant weight to any discrepancies in their testimony about his uniform.

The respondent also points to alleged differences in two of the Government deposition witnesses' testimony about Kalejs' height as evidence that their recollections of the respondent were not reliable. He contends that there was a 10 1/4" inch difference in the testimony of Soms (1.52 meters) and Pimanis (1.78 meters) about Kalejs' height. Respondent's brief at 37. The respondent has not specified where in the record Soms said that Kalejs was only 1.52 meters tall. When Soms was asked during his deposition to stand next to respondent's counsel, the videotape of that deposition reflects that Soms indicated that Kalejs was a few inches shorter than respondent's counsel (Gov. Exh. 81A at 18:15:00 to 18:15:15; Gov. Exh. 81CT at 57-58). Respondent's counsel indeed is about 3" taller than the respondent (Tr. at 1210-11; Respondent's brief at 36). In

addition to his photographic identifications of Kalejs, Soms also appears to have recalled Kalejs' height with a reasonable degree of precision. Furthermore, the remaining Government deposition witnesses were generally consistent in their recollections of Kalejs' height, weight, and age. [29]

Based on our review of the Government deposition witnesses' descriptions of the respondent's physical characteristics, we find that the respondent's claim of an

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[29] Concerning the respondent's height (1.74 meters), the witnesses testified as follows: Strazds--Kalejs came up to his nose, and Strazds was 1.85 meters; Bahsteins--Kalejs was shorter than 1.75 meters; Ennitis--Kalejs was about 1.78 meters; Rozkalns--Kalejs came up to his nose, and Rozkalns was 1.85 meters; Pimanis--Kalejs was 1.78 meters, or a bit taller. They recalled Kalejs' weight (73 kilograms) as follows: Soms---Kalejs weighed well over 56 kgs.; Strazds--over 70 kgs.; Bahsteins--over 70 kgs.; Ennitis--over 66 kgs.; Rozkalns--under 75 kgs.; Pimanis--over 72 kgs. They recalled Kalejs' age in 1942 (Kalejs' 29th birthday was in June 1942), as follows: Soms--Kalejs was 29; Strazds--27; Bahsteins--under 40; Ennitis--over 23; Rozkalns---over 30; Pimanis--about 30. Rozkalns also recalled that Kalejs' eyes were blue.

"utterly preposterous composite physical description" is not supported by the record. Respondent's brief at 37. Neither the Government deposition witnesses' photographic identifications of the respondent, nor their recollections of his physical appearance, in our view, indicate that the testimony of these witnesses was unreliable: The immigration judge did not err in relying on the identification testimony as further evidence that the Soviet deposition testimony was reliable. Accordingly, we will now turn to a consideration of the issues which the respondent has raised regarding his deportability.

II. DEPORTABILITY UNDER SECTION 241(a)(19)

Based upon his review of the evidence, the immigration judge

found that the respondent was deportable under section 241 (a)(19). The immigration

judge did not find, however, that the Government had established all of the allegations in support of the section 241(a)(19) deportability charge. For instance, the immigration judge found that the respondent's participation in the self-defense unit near Litene in June and July 1941 did not establish that, under the direction of the Nazis, the respondent had persecuted persons on the basis of their political opinions (i.j. dec. at 27-28). The immigration judge further found that although the evidence in the record documented the respondent's membership in the "Arajs Kommando" between July and December 1941, such membership alone did not establish that the respondent had "assisted" or "participated" in persecution within the meaning of section 241(a)-(19) (i.j. dec. at 29-31).

On the other hand, the immigration judge found that the evidence of the respondent's activities as a company commander of the "Arajs Kommando" on the eastern front in 1942 proved that the respondent had assisted or participated in Nazi persecution (i.j. dec. at 32-34). He found that the evidence of the respondent's activities in Porkhov and Skaune in 1943, again as an "Arajs Kommando" company commander, established that the respondent had assisted or participated in Nazi persecution (i.j. dec. at 34-35). Finally, the immigration judge ruled that the evidence established that the respondent was the commander of guard units at the Sauriesi and Salaspils concentration camps, and that this service also rendered him deportable under section 241(a)(19) (i.j. dec. at 35-36).

On appeal, the respondent urges that the immigration judge erred in finding sufficient evidence to support the section 241(a) (19) charge of deportability. He submits that the immigration judge's finding that the respondent was a member of the "Arajs Kommando" is erroneous. He argues that he did not engage in persecution when he was on the eastern front in 1942, because his service there was "purely military." Respondent's brief at 41. He contends that contrary to the immigration judge's findings, the respondent was not at Porkhov and Skaune, and he also did not serve at the Salaspils or Sauriesi camps. Finally, the respondent argues that the immigration judge erred by disregarding the statements of Viktors Arajs which exonerated the respondent.

A. <u>The Respondent's Credibility</u>

The respondent appeared as a witness before the immigration judge in this case, and the immigration judge, as the trier of fact, was in the best position to observe the respondent's demeanor and to assess the credibility of his testimony. See Matter of Kulle, supra, at 331-32; Kulle v. INS, supra, at 1193; United States v. Kairys, 782 F.2d at 1380. The courts have recognized that the general rule of deference to a trial court judge's credibility findings applies with even greater force in war-crimes cases, where the testimony of the witnesses concerns events over 40 years ago, and the trier of fact must carefully evaluate the testimony presented before him. [30]United States v. Kowalchuk,

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[30] While this Board is in an equally good position as the immigration judge to review the videotaped testimony of the deposition witnesses, we must defer to the immigration judge's credibility findings concerning the witnesses who appeared before him, provided that a reasonable basis is offered for such findings.

773 F.2d at 499 (Aldisert, J., dissenting); United States v. Sprogis, 763 F.2d 115, 121-22 (2d Cir. 1985). The immigration judge here found the respondent's explanation for the documents which reflected his service in the "Arajs Kommando" to be not credible (i.j. dec. at 29-30, 33-34). We find ample support in the record for this adverse credibility determination.

Although the respondent admitted that he had submitted documents to the University of Riga indicating that he was serving as a first lieutenant and company commander in the "Arajs Kommando" (Gov. Exhs. 23, 25, 44, 45), the respondent claimed that the contents of these documents were false. He said that he obtained these documents from an acquaintance, and that the respondent submitted them to the uni-

versity as part of his registration there. The immigration judge properly discredited the respondent's testimony about these documents by noting first, that the respondent had not adequately explained why he could not obtain a certificate of military service from the unit he claimed to be serving in, and second, that one of the documents reflecting the respondent's "Arajs Kommando" service was in the respondent's own handwriting (Gov. Exh. 45).

The respondent claimed he was unable to acquire a certificate of military service from the German unit that he actually served with, and that he accordingly had to resort to obtaining fraudulent "Arajs Kommando" documents. But this claim is contradicted by the certificate which reports that the respondent was serving with the "Arajs Kommando" on the eastern

front in 1942, corresponding precisely with the period in which the respondent admitted that he had served on the eastern front (Gov. Exh. 25). It is not believable that if the respondent had resorted to obtaining false certificates from the "Arajs Kommando," an organization he claimed he had nothing to do with, the false certificates which he ultimately acquired would accurately reflect his period of service on the eastern front. The more reasonable explanation for the certificate concerning the respondent's eastern front service with the "Arajs Kommando" is that the certificate is genuine. We therefore find no basis to disturb the immigration judge's credibility finding concerning the respondent, [31]and we

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[31] We also agree with the immigration judge's observation that the respondent's testimony was implausible that he was not engaged in any military or police service for over 2 years, but that he nonetheless continued to receive pay from German

reject as not credible the respondent's steadfast denial as to membership in the "Arajs Kommando."

Based on our rejection of the respondent's explanation for the documents he submitted to the university, we find that those documents are reliable evidence of the respondent's service in the "Arajs Kommando." The cumulative effect of this evidence establishes that the respondent was a member of the "Arajs Kommando" from July 1941 until at least May 1943 (Gov. Exhs. 23, 45). The evidence further establishes that the respondent served as a company commander and first lieutenant in

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military authorities during this period (i.j. dec. at 35). Further testimony of the respondent which strained credulity was his claim that, although he admitted to being present in Riga in November and December 1941, he then knew nothing about the mass executions of Jews in the forests near Riga. Cf. Gov. Exh. 22 at 70 ("the ghetto evacuation had become a city-wide topic of conversation in all Riga"), and 132 ("the fate of the Jews shot on [November 30, 1941] was generally known in Riga").

the "Arajs Kommando" (Gov. Exhs. 23, 45). [32]This evidence discredits the respondent's testimony about his non-military activities during the Nazi occupation of Latvia, while it corroborates the testimony of those Government deposition witnesses, and the respondent's deposition witness Jurgitis, who testified unequivocally that they had known the respondent as a member and officer of the "Arajs Kommando."

B. Evidence of Deportability under Section

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[32] The respondent contends that if he had been a "high ranking officer" in the "Arajs Kommando," he would have received promotions during the war as a matter of course." Respondent's brief at 46. Because the respondent's rank apparently remained at first lieutenant throughout the war, the respondent points to the absence of a promotion as evidence that he did not serve actively during the war. Although the respondent was free to do so, he submitted no evidence concerning the frequency of promotions received by officers in Nazi-occupied countries. The respondent was also free to cross-examine Dr. Hilberg concerning the significance of this matter. We do not consider evidence of promotions, or absence of promotions, to be part of the Government's burden of proof in establishing the respondent's membership in the Arajs Kommando."

241(a)(19)

1. Respondent's Service on the Eastern Front

We begin our analysis of the respondent's deportability based on his activities on the eastern front by emphasizing that the respondent admitted that in early 1942, he had served on the eastern front under General Stahlecker, the "Einsatzgruppe A" Commander of the German Security Police. [33]In his report dated October 15, 1941, Stahlecker describes how the "Einsatzgruppe A" forces were carrying out the anti-partisan campaign on the eastern front:

Whoever aided partisans by supplying

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[33] We find wholly unpersuasive the respondent's subsequent testimony in which he attempted to distance himself from Stahlecker by claiming that the respondent's commanding officer on the eastern front was a "Wehrmacht general" whose name he could not recall.

> shelter and food, or providing messenger service, or purposely gave false information, was shot or hanged. Houses in which partisans had received shelter and food were burned down. If a larger number of village residents had aided the partisans in this manner, the entire village was burned down as a punishment as well as a deterrent.

Gov. Exh. 20, appendix 9, at 7-8. This Stahlecker report serves as background evidence for the respondent's participation in anti-partisan operations on the eastern front.

We do not find, however, that the testimony regarding specific incidents in which the respondent allegedly participated in the burning of villages and killing of inhabitants establishes the respondent's involvement in the "persecution" of per-

sons because of their "political opinions." The immigration judge relied on the testimony of Soms and Rozkalns to conclude that the respondent was the commander of the company which executed civilians as a reprisal for Stahlecker's death, and that this testimony supported the charge that the respondent had assisted and participated in "persecution" within the meaning of section 241(a)(19) (i.j. dec. at 32, 34).

We have reviewed carefully the testimony of Soms and Rozkalns concerning the battle at Sanniki in which Stahlecker was fatally wounded in March 1942 (See Soms, Gov. Exh. 81CT at 32-35, 95-97; Rozkalns, Gov. Exh. 92CT at 11-12, 19-21). There were no apparent contradictions in their testimony, and we find their accounts of this incident to be credible. But neither Soms nor

Rozkalns witnessed the killing of civilians in this village; their testimony that the Kalejs Company had executed civilians to avenge Stahlecker's wounding was based on hearsay. [34]In addition, Soms and Rozkalns offered no specific testimony about the inhabitants of the village. They made no estimate as to how many were aiding the partisans, how many were unarmed, or how many were killed.

The testimony of Soms and Rozkalns does not establish a sufficient evidentiary basis to conclude that the "principal motivating factor" of the Kalejs Company's engagement at Sanniki was the persecution of villagers because of their "political opinions," or one of the other grounds enumerated in section 241(a)(19). Maikov-

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[34] Soms' testimony that the Kalejs Company had previously killed civilians in a village near Nasva was similarly based on hearsay (Gov. Exh. 81CT at 29-31).

skis v. INS, 773 F.2d 435, 448 (2d Cir. 1985), cert. denied, 476 U.S. 1182 (1986). Considering Soms' testimony that Stahlecker had selected Sanniki as a site of strategic significance, the operation at Sanniki appears to have been based, at least at the outset, on military considerations. Cf. Matter of Rodriguez-Majano, 19 I&N Dec. 811, 815 (BIA 1988) ("engaging in military actions" does not constitute "persecution" within the meaning of section 101(a)(42)(A) of the Act, 8 U.S.C. § 1101(a)(42)(A)). Soms and Rozkalns testified that the partisans at Sanniki offered some resistance before the Kalejs Company broke into the village, consistent with Dr. Hilberg's testimony that the partisans often met the Nazi forces with armed resistance. The respondent, of course, claimed that no civilians were deliberately killed during this operation. Thus, we

do not find clear, unequivocal, and convincing evidence that the respondent's participation in the battle at Sanniki renders him deportable under section 241-(a)(19).

We do find, however, that Strazds' testimony concerning the Kalejs Company's activities near Porkhov in 1943, corroborated by documentary evidence in the record, establishes the respondent's deportability under section 241(a)(19). Strazds gave detailed testimony concerning the activities of the Kalejs Company, which consisted of about 150 men, on the eastern front in 1943 (Gov. Exh. 83CT at 42-67). We have not found any inconsistencies in the testimony of Strazds, nor has the respondent identified any inconsistencies in Strazds' testimony. Moreover, as noted by the immigration judge, Strazds' testi-

mony regarding Kalejs' whereabouts in 1943 did not conflict with the testimony of any of the other deposition witnesses (i.j. dec. at 34). Considering that Strazds made several photographic identifications of the respondent, and in view of the detail and consistency of his testimony, we find that Strazds was both a reliable and a credible witness. See United States v. Osidach, supra, at 86 n.16.

Strazds testified about a specific incident in which he observed the Kalejs Company's participation in the execution of civilians (Gov. Exh. 83CT at 50-53, 136-38). He testified that sometime after June 1943, members of the Kalejs Company stood guard at an execution site near Porkhov where about 30 Gypsies were shot by German "SD" officials. The Kalejs Company members then buried the corpses.

Although Strazds did not specifically recall the respondent's presence at the execution site, Strazds believed the respondent would have authorized his company members to stand guard there.

Strazds' testimony that members of the Kalejs Company participated in the execution of civilians is corroborated generally by evidence that "Einsatzgruppe A" units engaged in persecution along the eastern front. A captured Nazi document dated March 16, 1942, reflects that "Einsatzgruppe A" forces had killed 38 Jews and one Gypsy in Loknja (Gov. Exh. 38 at 2). The record reflects that the respondent was serving with the "Loknja Detachment" of "Einsatzgruppe A" between February 18 and April 26, 1942 (Gov. Exh. 37). Further evidence of the execution of civilians by the "Einsatzgruppe A" forces

can be found in the second report prepared by General Stahlecker. This report, prepared in January 1942, indicates that "Einsatzgruppe A," with the assistance of the "Einsatzkommandos," had been carrying out mass executions of Jews along the eastern front in "White Russia" (Gov. Exh. 34 at 4-5; Tr. at 120). Dr. Hilberg also testified that "Einsatzgruppe A" forces routinely executed civilians behind the front lines (Tr. at 266-70).

Strazds, Soms, and Rozkalns all testified that the respondent was a first lieutenant and company commander of an "Arajs Kommando" unit that was deployed on the eastern front (Gov. Exh. 83CT at 10; Gov. Exh. 81CT at 19, 36; Gov. Exh. 92CT at 17-18, respectively). Strazds, Soms, and Rozkalns further testified that the respondent was subordinate to Lange, the

German Commander of the Security Police for "Einsatzkommando 2" (Gov. Exh. 83CT at 59-60; Gov. Exh. 81CT at 21; Gov. Exh. 92CT at 18-19, respectively). The respondent's service on the eastern front as a first lieutenant and company commander in the "Arajs Kommando" is also corroborated by the documents which the respondent submitted to the University of Riga (Gov. Exhs. 25, 44). Thus, the evidence in the record firmly establishes that the respondent was the leader of an "Arajs Kommando" company which engaged in persecution at the eastern front.

The respondent's appeal arises within the United States Court of Appeals for the Seventh Circuit. In Kulle v. INS, supra, the Seventh Circuit applied section 241-(a)(19) to a case involving an alien who had served as a guard at the Gross-Rosen

concentration camp. The Court ruled that Kulle's "assistance" in persecution could be "inferred from the circumstances" of his "presence at a place of persecution." Id. at 1193. The Court also emphasized that in order to establish that an alien has "assisted" in persecution, "personal involvement in atrocities need not be proven," and that section 241(a)(19) "utilizes the term 'assisted' in persecution quite liberally." Id. at 1192-93.

Because the evidence clearly demonstrates that the respondent was the commander of a unit which engaged in persecution, we find that his status as a commanding officer of that unit brings him within the ambit of section 241(a)(19), even in the absence of direct evidence that he specifically ordered the execution

of civilians. [35]The evidence in the record indicating that the respondent was the head of an "Arajs Kommando" company which executed Gypsies near Porkhov in 1943 establishes, at a minimum, that the respondent "assisted" in the persecution of persons because of their "race, religion, national origin, or political opinion." Moreover, because the record reflects that the respondent served "under

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[35] We find support for the conclusion that the respondent should be held responsible for the actions of his subordinates in the legislative history accompanying the Holtzman Amendment, which implemented section 241(a)(19) of the Act. The legislative history instructs that in applying the "persecution" provisions of section 241(a)(19), determinations should be made on a case-by-case basis by consulting available case law as well as the opinions of the Nuremberg tribunals and related materials. See H.R. Rep. No. 95-1452, 95th Cong., 2d Sess. at 6-7, reprinted in 1978 U.S. Code Cong. & Admin. News at 4705-06. The London Agreement of August 1945 (59 Stat. 1544), under which the first Nuremberg trial was conducted, provided with regard to "crimes against humanity" that "[l]eaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan." See also Matter of McMullen, 19 I&N Dec. 90, 96 (BIA 1984), aff'd, McMullen v. INS, 788 F.2d 591 (9th Cir. 1986).

the direction of" the Nazi authorities at the eastern front, his deportability under section 241(a)(19) has been established by clear, unequivocal, and convincing evidence.

2. Respondent's Service at Salaspils and Sauriesi

We also find that the record supports the immigration judge's

conclusion that the respondent's service at the Salaspils concentration camp and Sauriesi labor camp renders him deportable under section 241(a)(19). Government deposition witnesses Pimanis, Ennitis, Strazds, and Bahsteins all placed the respondent at the Salaspils concentration camp at various periods in 1942 and 1943.

[36]Pimanis identified the respondent as a first lieutenant and company commander of the "Arajs Kommando" whom Pimanis saw at Salaspils once in August or September 1942 (Gov. Exh. 93CT at 9-10, 13-14). Ennitis said that the respondent was the head of the external guard unit at Salaspils, and that Ennitis served in the Kalejs Guard Company from July to December 1942; Ennitis last saw the respondent at Salaspils when the respondent approved Ennitis' transfer request in December 1942 (Gov. Exh. 90CT at 10-11, 14, 53-54). Strazds

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[36] The immigration judge did not rely on Dr. Hilberg's testimony that he had reviewed statements from Artur Abols which placed the respondent at Salaspils as the company commander of the guard forces. The immigration judge apparently did not rely on this testimony because the Government did not produce Abols' statements. We also have not relied on Dr. Hilberg's testimony regarding Abols' statements. We furthermore have not relied on Strazds' testimony that members of the Kalejs Company stood guard at a concentration camp near Porkhov as evidence that the respondent "served as commander of an Arajs Kommando guard unit in concentration camps in the Ostland." See Allegation No. 19 in Amended Order to Show Cause (Gov. Exh. 15 at 4).

stated that he first saw the respondent at Salaspils in November 1942, when the respondent was the commander of the external guard unit (Gov. Exh. 83CT at 10, 18-19). Strazds said that the Kalejs Guard Company had about 100 members at Salaspils (Gov. Exh. 83CT at 20). Strazds testified that in December 1942, the respondent personally appointed Strazds as the chief guard at Sauriesi, the labor camp near Salaspils (Gov. Exh. 83CT at 10, 21-22). Strazds added that the respondent made weekly visits to Sauriesi, and that Strazds left Sauriesi for Porkhov in June 1943 with the Kalejs Company (Gov. Exh. 83CT at 11, 42-43). [37]Bahsteins was an "Arajs Kommando" clerk who remembered the respondent as the

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[37] one of the documents which the respondent admitted that he had submitted to the University of Riga indicates, in the respondent's own handwriting, that he was serving "in the Latvian Security Section as a company commander;" the document is dated May 15, 1943 (Gov. Exh. 45).

head of the guard company during Bahsteins' period of service at Salaspils from the Winter or Spring of 1943 until the Fall of 1943 (Gov. Exh. 89CT at 12-13).

We find no conflicts in the testimony of the Government deposition witnesses who placed the respondent at Salaspils in the capacity of commander of the guard unit.[38] Their testimony concerning the duties of the guards at Salaspils and Sauriesi

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[38] While the respondent contends that there is a contradiction between Bahsteins and Strazds' testimony concerning the respondent's presence at Salaspils, we note that Bahsteins testified that he remained at Salaspils until the Fall of 1943, when he deserted (Gov. Exh. 89CT at 9, 23). Bahsteins did not specifically state that he had seen Kalejs at Salaspils following the Spring of 1943. Thus, we find no conflict between Bahsteins' testimony concerning the respondent's presence at Salaspils, and Strazds' testimony that Strazds went to Porkhov with the Kalejs Company in June 1943. Moreover, the respondent's deposition witness Murnieks did not recall Kalejs from Salaspils, where Murnieks served approximately from the Summer of 1943 until the Fall of 1943 (Gov. Exh. 86CT at 9, 64-66). According to Strazds' testimony, however, the respondent had departed Salaspils by the Summer of 1943 (Gov. Exh. 83CT at 11).

was consistent. [39]Strazds, Ennitis, and Pimanis all testified that, as members of the "Arajs Kommando" guard unit, they were armed and had orders to shoot to prevent inmates from escaping (Gov. Exh. 83CT at 27-28; Gov. Exh. 90CT at 17-18; Gov. Exh. 93CT at 15-16, respectively). Moreover, although the survivor witnesses generally were at Salaspils before the Government deposition witnesses, the survivor witnesses' testimony about conditions at Salaspils and the German officers whom they recalled there (Nickel, Teckelmeier,

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[39] We attribute no significance to the inability of some of the Government deposition witnesses to recall one another. Respondent's brief at 45. Considering that the Kalejs Guard Company consisted of at least 100 men, and that the overlapping periods of these witnesses at Salaspils were brief, we see no import in their inability to recall other guards of equivalent rank. The respondent cites the overlapping period of Ennitis and Pimanis at Salaspils as an example of Government deposition witnesses who ought to have remembered each other. Yet, according to Pimanis, he served at Salaspils for only about 5 days (Gov. Exh. 93CT at 14), and would have had only that 5-day period from which to recall Ennitis there.

Krause, and Lange) corroborated the testimony of the Government deposition witnesses. Accordingly, we find that the testimony of the Government deposition witnesses constitutes credible and reliable evidence that the respondent was the head of "Arajs Kommando" guard units at the Salaspils concentration camp and the Sauriesi labor camp. [40]The testimony of the Government deposition witnesses, corroborated by Dr. Hilberg, also establishes that Jews and political prisoners were interned at Salaspils during the period that the respondent was the commander of the external guard unit.

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[40] The respondent argues that if he had served at Salaspils, his name would have been mentioned in a 1975 Soviet publication concerning Salaspils (Gov. Dep. Exh. 6). The fact that his name is not mentioned in this publication, according to the respondent, is proof that "[t]he Soviet allegations against respondent are recent fabrications." Respondent's brief at 46. Regardless of whether he was mentioned in a prior publication, we are satisfied from our review of all the evidence in the record that the allegations concerning the respondent are not a "recent fabrication."

The evidence in the record establishes clearly, unequivocally, and convincingly that the respondent was the commander of a unit of armed guards at a Nazi concentration camp in periods during 1942 and 1943. His status as the commander of a guard unit establishes, again at a minimum, that he "assisted" in the persecution of inmates because of their "religion" or "political opinions;" the respondent is consequently deportable under section 241(a)-(19). See Kulle v. INS, supra, at 1192-93; Schellong v. INS, 805 F.2d 655, 660-61 (7th Cir. 1986), cert. denied, 481 U.S. 1004 (1987), reh'g denied, 482 U.S. 921 (1987); see also United States v. Schmidt, 923 F.2d 1253, 1258-59 (7th Cir. 1991), cert. denied, ___ U.S.__, 112 S.Ct. 331 (1991); United States v. Kairys, 782 F.2d at 1378. The immigration judge's conclusion that the respondent is deportable

based on his service as the commander of a concentration camp guard unit was correct.

3. Respondent's Service in the "Arajs Kommando" from July 1941 to January 1942

Finally, we will address the Government's argument that the respondent is deportable under section 241(a)(19) based on the evidence that he was an "Arajs Kommando" officer between July 1941 and January 1942. See, e.g., Government's brief at 93-94, 111-13. Although the immigration judge found that the respondent's "mere registration" with the "Arajs Kommando" in 1941 was not sufficient evidence to establish that the respondent had assisted in persecution (i.j. dec. at 30), our review of the evidence in the record compels a different conclusion. Dr. Hilberg's unrebutted testimony was that the

primary function of the "Arajs Kommando" between July 1941 and January 1942 was to assist the Nazis in the annihilation of tens of thousands of Jews. The evidence in the record indicates that the respondent was an officer of the "Arajs Kommando" during this period (Gov. Exhs. 23, 25). Dr. Hilberg did not state unequivocally that the respondent was involved in atrocities during the period in question. He did state, however, that considering that the "Arajs Kommando" consisted of only a few hundred men at the end of 1941, the Kommando would have employed virtually all of its members to carry out its enormous persecutory agenda. It is inconceivable that the respondent, as an officer in the "Arajs Kommando," would have avoided any participation in the atrocities carried out on such an enormous scale over a period of months. The principle of Kulle v.

INS, supra, at 1193, applies here that his role in the mass murders is clearly "inferred from the circumstances," those "circumstances" being that he was an officer in a death organization whose limited resources were so strained by the extent of the slaughter that all personnel were required to participate.

Dr. Hilberg's testimony was corroborated by the deposition witnesses who testified that all "Arajs Kommando" members, including supply clerks and garage attendants, were required to participate in the actions against Jews following the Nazi occupation in 1941 (See, e.g., Jurgitis, Gov. Exh. 82CT at 25-26; Kalnins, Gov. Exh. 85CT at 22-23; Elins, Gov. Exh. 88CT at 39-40; Jansons, Gov. Exh. 91CT at 46-47). While the deposition witnesses did not implicate the respondent in the mass

executions of Jews in the forests near Riga, they confirmed the expert witness testimony that "Arajs Kommando" members necessarily were involved in persecution between July 1941 and January 1942.

Furthermore, we find that the respondent, who has maintained that he did not belong to the "Arajs Kommando" despite the evidence to the contrary, has failed to provide a credible account of his activities during this period. [41]Therefore, in view of Dr. Hilberg's testimony, corroborated by the deposition witnesses, that virtually all "Arajs Kommando" members assisted in the atrocities against Jews in late 1941, and considering the respondent's failure to rebut the evidence in the record that he was an "Arajs Kommando"

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[41] This failure of credibility stretches back even to his accounts given years ago to Australian and U. S. Immigration officials. See, e.g., pages 48, 51, infra.

officer beginning in July 1941, we conclude that there is clear, unequivocal, and convincing evidence to support the charge that the respondent is deportable under section 241(a)(19) because he "assisted" the Nazis in the persecution of Jews between July 1941 and January 1942. Kulle v. INS, supra, at 1192-93.

C. Testimony of Viktors Arajs

The respondent argues that the immigration judge erred by disregarding the proffered statement of Viktors Arajs concerning the respondent. The respondent argues further that the immigration judge should have given weight to the testimony of Arajs' attorney concerning both the Arajs' trial and the attorney's discussions with Arajs about whether Arajs knew the respondent. The respondent asserts that this evidence is the "best evidence" available

regarding the issue of the respondent's membership in the "Arajs Kommando." Respondent's brief at 47.

The immigration judge gave no weight to the respondent's evidence of an "alleged interview with Viktors Arajs" (i.j. dec. 31 n.5). The immigration judge also gave no weight to the Government's evidence concerning an "alleged interview with Viktors Arajs" (i.j. dec. at 31 n.5). Therefore, the broad issue presented here is whether the immigration judge erred in giving no weight to either party's evidence of an interview with Viktors Arajs.

The attorney who represented Viktors Arajs in his criminal trial in West Germany, Georg Buerger, appeared at the respondent's hearing to testify. Buerger testified that he was not present "every single day" during the Arajs trial, but

that as far as he knew, the name "Konrads Kalejs" was not mentioned during the Arajs trial (Tr. at 1035-36). Buerger also testified that respondent's counsel contacted him in May 1985, and asked Buerger to ask Arajs whether Arajs knew the respondent (Tr. at 1039-40). According to Buerger, Arajs told him that Arajs knew the respondent from the Latvian Legion, that the respondent had not served under Arajs' command, and that Arajs knew the respondent was present when Stahlecker died (Tr. at 1041).

Arajs' statements were subsequently reduced to writing. Arajs executed a written statement dated January 16, 1987, which was signed before Buerger in his capacity as a notary, indicating that the respondent did not serve under Arajs in the Latvian Auxiliary Security Police, and

that the respondent had served in the 15th Latvian Armored Infantry Division; the document provides further that when Arajs was the leader of the Latvian Auxiliary Security Police, he "frequently helped Latvians by issuing false certificates" which "were used to enable Latvians to progress in schools or universities." The immigration judge accepted this document into evidence (Gov. Exh. 102).

The Government also produced a witness who gave testimony about an interview which he conducted with Viktors Arajs. The Government investigator, Thomas Fusi, testified that he interviewed Arajs in prison on July 11, 1984, in Kassel, West Germany (Tr. at 1311-12). Fusi testified that Arajs had said during the interview that Kalejs was a member of Arajs' battalion, and that Kalejs was a company com-

mander in the "Arajs Kommando" (Tr. at 1313-14). Fusi stated that he took notes during his interview of Arajs (Tr. at 1316). The immigration judge accepted a photocopy of the proffered notes into evidence (Gov. Exh. 107).

Faced with these conflicting accounts of Arajs' statements, the immigration judge opted to give weight to neither party's evidence of what Arajs had said. We find no error in the immigration judge's resolution of this issue. As the immigration judge observed, neither party offered a verbatim transcription of an interview with Viktors Arajs. Moreover, neither party properly deposed Arajs, in accordance with the regulations, prior to his death in 1988. Considering all of the circumstances surrounding the competing evidence of what Arajs said about the

respondent, we agree with the immigration judge's decision not to accord weight to either party's evidence of Arajs' statements. We observe, finally, that Viktors Arajs, sentenced to life imprisonment in West Germany for the joint murder of at least 13,000 persons during the war (Gov. Exh. 22), was not in a proper position to offer reliable statements to either party concerning the respondent's war-time activities.

III. DEPORTABILITY BASED ON WILLFUL MISREPRESENTATION OF A MATERIAL FACT

The respondent's final argument on appeal is that the immigration judge erred by concluding that the respondent is deportable because he obtained his visa by means of a willful and material misrepresentation. The respondent asserts that the

Government failed to meet its burden of proving the respondent's deportability on this basis under sections 241(a)(1) and 241(a)(2) of the Act.

In its amended Order to Show Cause, the Government alleged that the respondent, in order to procure his immigrant visa in 1958, stated under oath to American immigration authorities that he had been a farm laborer in Nurmuiza, in the province of Talsi, Latvia, from 1941 to 1944 (Gov. Exh. 15 at 5). The Government alleged further that the respondent did not reveal that he had served in the "Arajs Kommando" of the Security Police and SS during this period (Gov. Exh. 15 at 5). The Government submitted into evidence the respondent's application for immigrant visa and alien

registration (Gov. Exh. 16). [42]This exhibit reflects that the respondent executed a sworn statement for an immigrant visa before an American Vice Consul at Melbourne, Victoria, Australia, on December 3, 1958. Item number 25 on the visa application required that the applicant list his places of principal residence after his sixteenth birthday, and also provided a space for the applicant to list his "occupation." The respondent indicated in his application that his occupation between the years of 1929 and 1941 was "Latvian Army" in Riga, Latvia. For the years 1941 to 1944, however, the respondent

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[42] We note that Government witness Epstein testified that the signature on the visa application was the same as the signature on documents known to have been signed by the respondent (Tr. at 649). We note too that the Government produced an expert witness in the field of fingerprint identification who testified that a set of the respondent's fingerprints, taken in 1988 (Gov. Exh. 48), were the same as a set of 1958 fingerprints in the respondent's application for an immigrant visa (Gov. Exh. 55) (Tr. at 662-64).

listed his occupation as "farm laborer," and he stated that he resided in Nurmuiza, Talsi, Latvia, during this period.

A. Government Witnesses

The Government presented two main witnesses to support its charge that the respondent willfully misrepresented a material fact in order to secure his immigrant visa. The first witness, Thomas F. Valenza, was the chief of the security branch of the U.S. Department of State Visa Office in Washington, D.C., from approximately 1953 until he retired in 1966. Valenza testified by deposition in these proceedings on April 11, 1986 (Gov.-Exh. 47T). The second witness, Jack Liebof, was the vice consul at the American Consulate General in Melbourne, Australia, from 1958 to 1960. Liebof testified before the immigration judge on April

25, 1988 (Tr. at 777-866).

JACK LIEBOF

Liebof, who was born in 1928, testified on direct examination that he was in charge of visa operations when he was at the American Consulate in Melbourne (Tr. at 781). He gave the following testimony concerning the visa-issuing process. He stated that visa applicants completed several preliminary applications prior to the preparation of their formal visa application (Tr. at 782-84). Liebof testified that he "invariably" interviewed "all applicants" who reached the stage of completing a formal visa application (Tr. at 787). He added that during the interview, he routinely asked the applicant whether he had read and understood the information in the application, and whether the information was correct (Tr. at 787). At the

conclusion of a satisfactory interview, the applicant would sign the visa application in Liebof's presence, and Liebof would also sign the application (Tr. at 787).

Liebof testified further that many of the visa applicants in Melbourne were of European' descent, and that he examined the "wartime activities" of these applicants "from a security standpoint" (Tr. at 788). Liebof recalled that, in accordance with the Immigration and Nationality Act, individuals who had engaged in "activities . . . considered prejudicial to the interests of the United States would be ineligible" for admission to the United States (Tr. at 806). He added that whenever a security issue arose, he would obtain as much information from the applicant as possible, and then request an advisory

opinion from the Visa Office at the Department of State in Washington, D.C. (Tr. at 791, 804). Liebof recalled too that the burden rested with the applicant to establish his visa eligibility, and Liebof said that in any doubtful case he would request an advisory opinion from the Visa Office (Tr. at 791).

Liebof stated that during the period he was at the American Consulate in Melbourne, the State Department policy was to deny visas, in accordance with the security provisions of the Immigration and Nationality Act, to applicants who were communists (Tr. at 794). He also stated that the State Department policy at that time was to deny visas to applicants with "serious involvement in Nazi activities" (Tr. at 794). Liebof reiterated that in doubtful cases involving these matters he

would request an advisory opinion from the Visa Office (Tr. at 794-95).

Liebof testified that he was not familiar with an organization known as the "Arajs Kommando" when he was working at the Consulate in Melbourne (Tr. at 796). Liebof stated, however, that if he knew that a visa applicant had been a member of the "Arajs Kommando" in Latvia between 1941 and 1944, he would have asked questions about the nature of the organization and the applicant's role in the organization (Tr. at 796). According to Liebof, he would have asked such questions "because activities during the War years were sensitive and could have a bearing on the eligibility of a person for a visa" (Tr. at 796).

Liebof identified his signature on the respondent's visa application and immi-

grant visa (Gov. Exhs. 16, 79). He testified further that standard operating procedures apparently had been observed during the processing of the respondent's visa (Tr. at 824).

On cross-examination, Liebof stated that he did not issue any more visas after he finished his tour in Melbourne in 1960; he retired from government service in 1967 (Tr. at 830-31). Liebof testified that he did not specifically remember the respondent, because Liebof had issued visas to numerous immigrants while he was in Melbourne (Tr. at 833). Liebof said that the average length of the visa interviews which he conducted was between 30 and 60 minutes (Tr. at 854). He stated that the interview might last 15 to 20 minutes in an "open and shut case" (Tr. at 855). Liebof testified that in making decisions

about the issuance of visas, he consulted the Immigration and Nationality Act and the accompanying regulations (Tr. at 840-41). He also consulted a State Department visa handbook as well as circulars which were received periodically from the Visa Office (Tr. at 841-42).

THOMAS VALENZA

The Government's other witness regarding the issue of the respondent's eligibility for an immigrant visa in 1958 was Thomas Valenza, who was born in 1909. Valenza testified that he became the chief of the Department of State Visa Security Branch in 1952 or 1953, and that he retained this position until he retired from government service in 1966 (Gov. Exh. 47T at 7). He stated that his office administered the security provisions of the Immigration and Nationality Act, specifically sections

212(a)(27), 212(a)(28), and 212(a)(29) (Gov. Exh. 47T at 8). [43]Valenza testified that this office would receive requests for advisory opinions from consular officers who had questions about an applicant's eligibility for a visa (Gov. Exh. 47T at 8).

Valenza was asked a series of hypothetical questions concerning how the Visa Security Office would have ruled on visa applications from individuals who had served in various organizations under the direction of the Nazi government of Germany (Gov. Exh. 47T at 12-27). Valenza testified that his office probably would have rendered an unfavorable advisory opinion for the following hypothetical visa applicants: an applicant who had voluntarily joined a Latvian Auxiliary Police unit and

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[43] These provisions were amended by the Immigration Act of 1990, supra, at section 601(a).

became a lieutenant during the Nazi occupation of Latvia (Gov. Exh. 47T at 17); an applicant who had served in a Latvian self-defense unit which persecuted persons based upon their political views (Gov. Exh. 47T at 19); an applicant who had served as a concentration camp guard for the Nazis (Gov. Exh. 47T at 20); an applicant who had been a member of a police battalion which rounded up Jews to send them to a concentration camp (Gov. Exh. 47T at 22); and an applicant who had been a member of the Latvian Legion, a "Waffen SS" military unit under the control of the German "SS" (Gov. Exh. 47T at 23). Valenza emphasized in his testimony that the applicants had the burden of establishing visa eligibility, and that if there was any doubt remaining regarding an applicant's eligibility, an unfavorable advisory opinion would be issued (Gov. Exh. 47T

at 20-22).

B. Respondent's Testimony

The respondent gave testimony on two separate occasions concerning his immigration to the United States. The first occasion was when he was deposed by Jeffrey Mausner (Gov. Exh. 17). At the deposition, the respondent was shown the photograph which appears on his immigrant visa, and the respondent acknowledged that this was a picture of him (Gov. Exh. 17 at 85-86). The respondent also stated that the signature on the visa application "[l]ooks like mine" (Gov. Exh. 17 at 86).

The respondent explained in his deposition that he had learned

from friends who wanted to immigrate that if they disclosed military service during World War II on a visa application, the application would be denied (Gov. Exh. 17

at 87). The respondent testified that, accordingly, when he elected to apply for immigration to Australia, he decided that he "would list [his] occupation as a civilian" (Gov. Exh. 17 at 87). He testified further that when he later applied to immigrate to the United States, he had no choice other than to "use the same story" (Gov. Exh. 17 at 88).

The respondent insisted that he had done farm labor between the years of 1941 and 1944 in Latvia (Gov. Exh. 17 at 88). He stated that he did farm work for "small periods" during "really bad times," and during vacation periods when he was a student (Gov. Exh. 17 at 88-89). He could not recall the names of the farms or owners of the farms where he worked because "there were quite a few places;" he did recall, however, that he had worked on a

farm near Litene and also in the area where he was stationed with the Red Army (Gov. Exh. 17 at 89-90). The respondent said that he did farm labor in order to get food (Gov. Exh. 17 at 89, 90). He could not state how much time he spent doing farm work in 1941 and 1942, but he said that he did the work whenever the need for food arose (Gov. Exh. 17 at 91).[44] He stated that when he did farm labor, he performed simple tasks such as gathering hay and wood, and taking care of horses (Gov. Exh. 17 at 91).

The respondent testified that he did not disclose his service in a police battalion in his visa application because he be-

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[44] At his deportation hearing, the respondent did specify areas where he claimed to have performed farm labor, and he maintained that during the period after his service on the eastern front in 1942 but before his entry into thee Latvian Legion in 1944, his time was divided equally between studying and doing farm work (Tr. at 1163-66).

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such persons were not permitted to immigrate (Gov. Exh. 17 at 92). He reiterated that he did not tell the Australian authorities about his police or military service so that he would be allowed to immigrate (Gov. Exh. 17 at 92).

The respondent also testified about his immigration to the United States at his deportation hearing. He stated that a "middle-aged or elderly lady" at the American Consulate in Melbourne helped him in processing his visa application; he added that this woman was "very much in charge" of his case (Tr. at 1179, 1181). The respondent recalled meeting with a consular officer who was a man, but he stated that this meeting lasted only for a minute and that the officer merely wished the respondent good luck in going to the United

States (Tr. at 1180, 1182, 1283). The respondent stated that he remembered signing his visa application before a consular officer, but he added that he did not specifically remember Jack Liebof, who testified at the respondent's hearing (Tr. at 1284-85). Finally, the respondent stated that he could not remember what questions he was asked while his visa application was being processed (Tr. at 1181). He also claimed, however, that he was not questioned about prior military service (Tr. at 1181).

C. Analysis

The immigration judge concluded that the Government had met its burden of proving that the respondent is deportable because he willfully misrepresented a material fact when he obtained his visa (i.j. dec. at 37). To support this conclusion, the

immigration judge relied on the respondent's admission that he intentionally did not disclose his military and police service during the war in his visa application. The immigration judge relied further on the testimony of Liebof and Valenza to establish the respondent's deportability. The immigration judge, citing the Supreme Court's decision in Kungys v. INS, supra, and this Board's decision in Matter of Bosuego, 17 I&N Dec. 125 (BIA 1980), held that the respondent's willful and material misrepresentation in his visa application rendered him inadmissible under section 212 (a)(19) of the Act, and consequently deportable as charged under sections 241-(a)(1) and 241(a)(2) of the Act.

The respondent's initial argument on appeal regarding the material misrepresentation issue is that the Board should not

adopt the Kungys "materiality" standard as applied in Matter of Laipenieks, A11 937 435 (BIA, 8-31-88) (unpublished). The respondent asserts that if the Board were to apply the Kungys standard as interpreted in Laipenieks, he would be placed in an unfair position. The respondent contends that the Laipenieks analysis places the burden on him to rebut evidence of inadmissibility under section 212(a)(19), and that this "newly announced standard" should not be applied to the respondent's case at this stage of the proceedings. Respondent's brief at 53.

The short answer to the respondent's Laipenieks argument is

that the Laipenieks decision which he relies on was not designated as a precedent decision. It is accordingly not binding in the respondent's case. 8 C.F.R. §

3.1(g); Matter of Medrano, Interim Decision 3138 (BIA 1990, 1991). For the reasons set forth below, however, we find that the Supreme Court's decision in Kungys v. INS, supra, should be applied here in assessing the "materiality" of the respondent's misrepresentation in his visa application.

In Kungys v. INS, supra, the Supreme Court grappled with the issue of whether the petitioner's citizenship had been "illegally procured . . . by concealment of a material fact or by willful misrepresentation . . .. See section 340(a) of the Act, 8 U.S.C. § 1451(a). Justice Scalia, writing for a majority on the issue of the appropriate "materiality" standard, held that the proper test for materiality under section 340(a) of the Act is "whether the misrepresentation or concealment was pre-

dictably capable of affecting, i.e., had a natural tendency to affect, the official decision." Kungys v. INS, 108 S.Ct. at 1547. The Court reaffirmed that this standard must be met with evidence that is "clear, unequivocal, and convincing." Id.

We find no procedural or substantive error in the immigration judge's reliance on Kungys v. INS, supra, in his decision. The Supreme Court's decision in Kungys was issued on May 2, 1988, nearly 6 months prior to the immigration judge's entry of a decision. Thus, the respondent had ample opportunity at the trial level to consider the impact of the Kungys decision and to argue against its applicability. We find no merit to the respondent's argument on appeal that the Kungys analysis unfairly places the burden on him to rebut evidence

of section 212(a)(19) inadmissibility.[45] The concept of an alien submitting evidence to rebut a section 212(a)(19) charge is hardly novel. In Matter of Bosuego, supra, at 131, we discussed the principle of law that after the Government demonstrates in a deportation case that an alien made a material misrepresentation to obtain a visa or admission to the United State, the burden then shifts to the alien to prove that he would have been admissible even if the true facts had been known. See also Matter of S-- and B--C--, 9 I&N Dec. 436 (BIA 1961). Irrespective of the Kungys decision, the respondent ought to have come forward at his deportation hearing with any evidence that he had relevant

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[45] The respondent contends that the "materiality" standard developed by the Supreme Court in Chaunt v. United States, 364 U.S. 350 (1960), should be applied in his case. In Kungys v. INS, 108 S.Ct. at 1545-47, however, the Court clearly criticized, if it did not overrule, the Chaunt analysis.

to the charge that he was excludable under section 212 (a)(19) at the time of his entry. We therefore find no procedural irregularity in the immigration judge's application of the Kungys decision in this case.

The respondent has reserved, but not raised, a substantive argument against the application of the Kungys "materiality" standard in a deportation proceeding. Respondent's brief at 52 n.6. We find no valid reason not to apply the Kungys "materiality" standard in the instant case. We do not consider the slight difference in the language employed in the denaturalization and deportation statutes to be sufficient to warrant entirely separate "materiality" standards for those proceedings. Cf. section 340(a) of the Act with former section 212(a)(19) of the Act

("concealment of a material fact or willful misrepresentation" vs. "fraud or willfully misrepresenting a material fact"); see also Schellong v. INS, supra, at 659-60. Moreover, in Kungys the Court expressed a desire to develop a more uniform "materiality" standard by equating the standards that had arisen in the criminal and denaturalization contexts. 108 S.Ct. at 1546. The consequences of a deportation proceeding may be equally as serious as the consequences of a criminal or denaturalization proceeding, and thus the Court's rationale for adopting a uniform "materiality" standard in criminal and denaturalization cases should logically extend to deportation cases as well. Id. We accordingly cannot infer from the Kungys decision a sound reason not to apply its "materiality" standard to a visa fraud issue in a deportation proceeding.

Nor are we aware of a post-Kungys federal court decision which expressly declined to apply the Kungys "materiality" standard to a deportation proceeding.

Applying, therefore, the Kungys "materiality" standard to the instant case, the precise issue is whether the Government has established by clear, unequivocal, and convincing evidence that the respondent made a willful misrepresentation in his visa application which had a "natural tendency to affect" the decision to issue him a visa. We find that the record supports the immigration judge's conclusion that the respondent "willfully" misrepresented a material fact when he secured his immigrant visa. According to his own testimony, the respondent did not disclose his war-time activities in his visa application because he believed this informa-

tion would prevent him from immigrating to the United States. See Federenko v. United States, 449 U.S. 490, 508 (1981); Matter of Kulle, supra, at 335; Kulle v. INS, supra, at 1196. Under these circumstances, where the respondent clearly intended to withhold information from a consular officer, we find that his misrepresentation regarding his war-time occupation was "willful." Moreover, we find that the information which the respondent misrepresented in his visa application did have a "natural tendency to affect" the decision to issue him a visa, and that his misrepresentation accordingly was "material."

Jack Liebof testified consistently in these proceedings that the war-time activities of persons of European descent was a sensitive and significant issue when he was screening visa applicants at the Amer-

ican Consulate in Melbourne. He testified without equivocation that if he had learned that a visa applicant had been a member of an organization which engaged in persecution under the direction of the Nazi government, he would have referred the matter to the Visa Security Office in Washington, D.C., for an advisory opinion. Thomas Valenza, in turn, testified that the Visa Security Office would most likely have issued an unfavorable advisory opinion, binding on the consular officer, for a visa applicant who had served as a concentration camp guard under the Nazis or had been a member of a police battalion which engaged in persecution under the direction of the Nazi government. The testimony of these former government officials, who were charged with the responsibility of administering the provisions of the Immigration and Nationality Act during

the period that the respondent immigrated to the United States, establishes that if there was any indication that a visa applicant had belonged to an organization under the direction of the Nazi government, this matter would have been carefully scrutinized in determining the applicant's eligibility for a visa. See Federenko v. United States, supra, at 513-14; Kulle v. INS, supra, at 1196; United States v. Schellong, 717 F.2d 329, 335 (7th Cir. 1983). We therefore find the testimony of the former government officials in this case to constitute clear, unequivocal, and convincing evidence that the respondent's willful failure to disclose the true nature of his war-time activities had a natural tendency to influence the decision to grant him a visa, and that the respondent accordingly misrepresented a "material" fact in order to

obtain his immigrant visa.

We wish to emphasize that while the Government has relied on the testimony of State Department officials whose employment was contemporaneous with the respondent's immigration to the United States, it does not seem necessary to us for the Government to produce the actual consular officer who reviewed the alien's visa application in order to establish that alien's deportability based on a misrepresentation of a material fact in the application. The proper inquiry in the "misrepresentation" analysis is to examine whether the misrepresentation had a "natural tendency to affect" a reasonable consular officer's decision to issue an immigrant visa. Since the standard is, in our view, objective in nature, the Government's practice of presenting the particular

consular officer who issued the immigrant visa seems superfluous. The testimony of an expert witness should suffice to establish State Department policy during a given era, especially when contemporaneous officials cannot be located or are deceased. See Federenko v. United States, supra, at 498-99. Having made this observation, we reiterate that the testimony of Liebof and Valenza here did establish the respondent's deportability by clear, unequivocal, and convincing evidence.

For his part, the respondent asserts that the testimony of Valenza and Liebof was insufficient to establish the respondent's deportability based on the visa fraud charge. He contends that the testimony of Valenza should be given no weight. The respondent points to two of the answers which Valenza gave to the hypotheti-

cals posed to him as alleged evidence that Valenza's testimony was wholly unreliable. First, the respondent argues that Valenza's testimony that the Visa Office probably would have rendered an unfavorable advisory opinion for a visa applicant who had been a, member of a Latvian Auxiliary Police unit is "clearly wrong," because it was established in such cases as United States v. Sprogis, 763 F.2d 115 (2d Cir. 1985), that Latvians who had served as policemen during the Nazi occupation of Latvia were not ineligible for immigrant visas merely because of that police service. Respondent's brief at 53. Second, the respondent argues that Valenza's testimony that the Visa Office would have rejected the visa application of a former member of the Latvian Legion is also wrong, because it was established in prior war-crimes cases that service in the Lat-

vian Legion did not render a visa applicant ineligible for immigration to the United States.

We note initially in response to this argument that Valenza's testimony that a former member of a Latvian Auxiliary Police unit probably would have been ineligible for an immigrant visa does not appear to be inaccurate. While it is true as a factual matter that the defendant in United States v. Sprogis, supra, disclosed his Latvian police service in his visa application and was nonetheless granted a visa pursuant to the Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009 ("DPA"), the government officials who have testified about this issue in deportation and denaturalization cases have indicated that a visa applicant who disclosed police service in an area occupied by Nazi Germa-

ny during World War II would have had his visa application rejected outright, or that at least a further inquiry would have been conducted concerning the applicant's eligibility. See United States v. Kowalchuk, 773 F.2d at 497; Maikovskis v. INS, supra, at 442; United States v. Koziy, 728 F.2d at 1320; United States v. Osidach, supra, at 103. Valenza's testimony appears to be consistent with the testimony of the government officials offered in these precedent cases.

Moreover, assuming arguendo that the respondent's assertion is correct that mere membership in the Latvian Legion did not disqualify an alien for an immigrant visa to enter the United States, we are not persuaded that Valenza's testimony to the contrary renders all of his testimony unreliable. Valenza's testimony was con-

sistent that his office would most likely have rendered an unfavorable advisory opinion for a visa applicant who had been a member of an organization involved in persecution under the direction of the Nazis; when his testimony is considered in conjunction with Liebof's, who testified consistently that an applicant's disclosure of membership in an organization which had engaged in Nazi persecution would have triggered a request for an advisory opinion, the conclusion is inescapable that if the respondent had listed his actual war-time occupation in his visa application, this information "would predictably have disclosed other facts relevant to his qualifications." Kungys v. INS, 108 S.Ct. at 1548. The issue of the respondent's inadmissibility due to his membership in the Latvian Legion is at best peripheral when compared to his inad-

missibility due to his membership in the "Arajs Kommando" and his service at a concentration camp under the direction of the Nazis. We therefore assign minimal significance to Valenza's testimony regarding the admissibility to the United States of a former member of the Latvian Legion.

The respondent argues further that Liebof's memory had faded, and that his testimony is not the "best evidence" concerning the respondent's admissibility to the United States at the time he obtained his visa. Respondent's brief at 57. The respondent asserts that the State Department visa handbook and Visa Office circulars, to which Liebof made reference in his testimony, should have been submitted by the Government as its evidence of the respondent's inadmissibility to this coun-

try. As discussed above, we have found Liebof's testimony in these proceedings to be clear and convincing. He demonstrated a firm recollection of the visa-issuing process as it operated when he was employed at the American Consulate in Melbourne. Both Liebof and Valenza displayed in their testimony a solid familiarity with the provisions of the Immigration and Nationality Act.

With respect to the visa handbook and circulars which the respondent urges ought to have been produced, there is no indication in the record that the Government had access to these materials, or that these materials are still in existence. There have been numerous cases where the Government has relied on the testimony of former government officials, without presenting State Department manuals as evidence of an

immigration policy, to establish that an individual involved in Nazi activities made misrepresentations to secure an immigrant visa or citizenship. See Kulle v. INS, supra at 1195-96; United States v. Schellong, 717 F.2d at 334; Maikovskis v. INS, supra, at 438, 442; United States v. Baumann, 764 F.Supp. 1335, 1336 (E.D.Wis. 1991); United States v. Palciauskas, 559 F.Supp. at 1299; United States v. Linnas, 527 F.Supp. at 439 n.34. We therefore find no merit to the respondent's argument that the testimony of Liebof and Valenza was inadequate to prove the "materiality" of the respondent's misrepresentation in his visa application.

The respondent also argues that the provision in the visa application asking the applicant to indicate his "occupation" was ambiguous, and that there is no evi-

dence in the record that the respondent was specifically asked during his visa interview whether he had performed any military or police service during World War II. The respondent obviously did interpret the term "occupation" as a request for information about his military service, since he listed "Latvian Army" in the application as his occupation from 1929 to 1941. His testimony that he actually was involved in some farm work between 1941 and 1944 did not establish that the respondent, in good faith, could have listed "farm laborer" as his occupation during this period. [46]The respondent admitted that he had served on the eastern

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[46] We have reviewed the testimony of the respondent's witnesses who stated that they knew the respondent between 1941 and 1944 (Namgauds, Tr. at 1052-65; Elguts, Tr. at 1070-79; Kula, Tr. at 1105-18; Olins, Tr. at 1119-31). We do not find the testimony of these witnesses to be sufficiently specific to corroborate the respondent's claim that he was a "farm laborer" during those years.

front from Winter to Fall of 1942, the evidence in the record demonstrates that the respondent was serving in the "Arajs Kommando" as a company commander in 1943 (Gov. Exh. 45), and the respondent admitted that he did not want to disclose any military or police service during the war years on his visa application. We therefore find no merit to the respondent's attempt to insert ambiguity into the term "occupation" as it appeared in his visa application. See Costello v. United States, 365 U.S. 265, 277 (1960).

Moreover, while the respondent claims that he was not asked about military service during his visa interview, he does not dispute that the visa application in the record bears his signature. He does not dispute that he executed his visa application under oath. The respondent has

therefore failed to rebut the presumption of official regularity. According to this rule of law, visa applicants are presumed to be aware of the full contents of their visa application. See United States v. Kairys, 600 F.Supp. at 1267; United States v. Dercacz, 530 F.Supp. 1348, 1352-53 (E.D.N.Y. 1982); Matter of G--, 9 I&N Dec. 570, 573 (BIA 1962). One may presume, therefore, that the respondent was aware of all the information which he provided in his visa application, including his misrepresentation of his "occupation" as a "farm laborer." Although Liebof testified that he did not remember the respondent in particular, Liebof also testified consistently that he reviewed the contents of formal visa applications with all applicants, and that the war-time activities of European visa applicants were a matter subject to careful scrutiny during the

visa-processing period. Specific evidence that Liebof questioned the respondent about his involvement in military or police service between 1941 and 1944 is not necessary to sustain the section 212(a)-(19) charge, since the respondent's misrepresentation concerning his "occupation" may well have cut off a further inquiry about his war-time activities.

Finally, the respondent asserts that the Government did not meet its burden of proving his deportability due to visa fraud because the Government did not submit into evidence the preliminary applications which the respondent completed prior to his formal visa application. The respondent asserts further that since the American Consulate in Melbourne had access to the Australian authorities' information, he did not foreclose any investiga-

tion that the United States might have conducted into his immigration to Australia. Here again, there is no indication in the record that the Government was capable of obtaining the preliminary visa applications completed by the respondent, or that these applications are still in existence. Moreover, we are not persuaded that these preliminary applications, as well as any background files that the Australian authorities might have had available concerning the respondent's immigration to Australia, would contain any evidence to exonerate the respondent. The respondent admitted that he intentionally withheld his record of military service from the Australian authorities when he immigrated there, and that he withheld the same information when he immigrated to this country. Therefore, in view of the respondent's admitted practice of withholding

information in order to immigrate, it is implausible that the deep background evidence to which the respondent now points would have any bearing on the visa fraud charge in this case.

We find that the record supports the immigration judge's conclusion that the Government established by clear, unequivocal, and convincing evidence that the respondent obtained his immigrant visa by willfully misrepresenting a material fact. As discussed above, we have also concluded that the Government has established the respondent's deportability under section 241(a)(19) by clear, unequivocal, and convincing evidence. After a review of the record in its entirety, we find that the entry of an order of deportation against the respondent was correct.

Accordingly, the respondent's appeal

from the immigration judge's decision ordering the respondent's deportation to Australia will be dismissed.

ORDER: The appeal is dismissed.

FOR THE BOARD

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois

AGENCY JUDGMENT
WITH ORAL ARGUMENT

Date: November 17, 1993

BEFORE: **Honorable** Walter J. Cummings, Circuit Judge

Honorable Daniel A. Manion, Circuit Judge

Honorable Garnet Thomas Eisele, Senior District Judge*

No. 92-2198

KONRADS KALEJS,

Petitioner

v.

IMMIGRATION AND NATURALIZATION SERVICE

Respondent

Petition for Review of an order of the Board of immigration Appeals No. A11 655 361

This cause was heard on the record from the Board of Immigration Appeals, and was argued by counsel.

On consideration whereof, **IT IS HEREBY ORDERED AND ADJUDGED** by this Court that the decision of the Board of Immigration Appeals, is AFFIRMED, with costs, in accordance with the decision of this court entered this date.

(1064-051993)

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois

December 30, 1993

Before

Honorable Walter J. Cummings, Circuit Judge

Honorable Daniel A. Manion, Circuit Judge

Honorable Garnet Thomas Eisele, Senior District Judge*

KONRADS KALEJS,

Petitioner

No. 92-2198 vs.

IMMIGRATION AND NATURALIZATION SERVICE

Respondent

Petition for Review from the Board of

ORDER

The petition for rehearing filed by petitioner on December 1, 1992, is hereby DENIED. However, Judge Eisele dissents since he favors a rehearing on the ground that the matter should be remanded to require a completely new evidentiary hearing upon the basis of the representations made in the petition for rehearing and upon the basis of the views originally stated in his dissent.

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*The Honorable Garnett Thomas Eisele, District Judge for the Eastern District of Arkansas, is sitting by designation.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois

January 10, 1994

Before

Honorable Walter J. Cummings, Circuit Judge

KONRADS KALEJS,

Petitioner

No. 92-2198 v.

IMMIGRATION AND NATURALIZATION SERVICE

Respondent

Petition for Review of an order of the Board of immigration Appeals No. A11 655 361

Upon consideration of the following:

1. MOTION SEEKING STAY OF ISSUANCE OF

MANDATE filed on 12/1/93, by counsel for the petitioner; and

2. SUPPLEMENT TO MOTION SEEKING STAY OF ISSUANCE OF MANDATE filed on 1/4/94, by counsel, which the court construes as a MOTION TO STAY JUDGMENT,

IT IS ORDERED that the motion are GRANTED and the judgment in this matter is STAYED to and including 2/7/94.

STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V -

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb' nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation"

8 U.S.C. Sec. 1105a

(a) Exclusiveness of procedure

The procedure prescribed by, and all the provisions of chapter 158 of title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or comparable provisions of any prior Act,

except that -

8 U.S.C. Sec. 1105a(a)(4)

Determination upon administrative record except as provided in clause (B) of paragraph (5) of this subsection, the petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial,

and probative evidence on the record considered as a whole, shall be conclusive;

8 U.S.C. Sec. 1105a(c)

Exhaustion of administrative remedies or departure from United States; disclosure of prior judicial proceedings

An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order. Every petition for review or for habeas corpus shall state whether the validity of the order has been upheld in any prior judicial proceeding, and, if so, the nature and date

thereof, and the court in which such proceeding took place. No petition for review or for habeas corpus shall be entertained if the validity of the order has been previously determined in any civil or criminal proceeding, unless the petition presents grounds which the court finds could not have been presented in such prior proceeding, or the court finds that the remedy provided by such prior proceeding was inadequate or ineffective to test the validity of the order.

8 U.S.C. Sec. 1182

Sec. 1182. Excludable aliens

(a) Classes of excludable aliens

Except as otherwise provided in this chapter, the following describes classes of excludable aliens who are ineligible to receive visas and who

shall be excluded from admission into the United States:

8 U.S.C. Sec. 1182(a)(3)(E) -

Participants in Nazi persecutions or genocide

(i) Participation in Nazi persecutions

Any alien who, during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with -

(I) the Nazi government of Germany,

(II) any government in any area occupied by the military forces of the Nazi government of Germany,

(III) any government established with the assistance or cooperation

of the Nazi government of Germany, or

(IV) any government which was an ally of the Nazi government of Germany, ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion is excludable.

8 U.S.C. Sec. 1182(a)(6) -

(C) Misrepresentation

(i) In general

Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or entry into the United States or

other benefit provided under this chapter is excludable.

8 U.S C. Sec. 1251(a) - Classes of deportable aliens

Any alien (including an alien crewman) in the United States shall, upon the order of the Attorney General, be deported if the alien is within one or more of the following classes of deportable aliens:

(1) Excludable at time of entry or of adjustment of status or violates status

(A) Excludable aliens

Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens excludable by the law existing at such time is deportable.

8 U.S.C. Sec. 1251(a)(1) -

(B) Entered without inspection

Any alien who entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this Chapter or any other law of the United States is deportable.

8 U.S.C. Sec. 1251(a) -

(4) Security and related grounds

(A) In general

Any alien who has engaged, is engaged, or at any time after entry engages in -

(D) Assisted in Nazi persecution or engaged in genocide

Any alien described in clause (i) or (ii) of section 1182(a)(3)(E) of this title is deportable.

8 U.S.C. Sec. 1252(b)

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held, (2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose, (3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence on his own behalf, and to cross-examine witnesses presented by the Government, and (4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

28 U.S.C. Sec. 2347

Petitions to review; proceedings

(a) Unless determined on a motion to dismiss, petitions to review orders reviewable under this chapter are heard in the court of appeals on the record of the pleadings, evidence adduced and proceedings before the agency, when the agency has held a hearing whether or not required to do so by law.

(b) When the agency has not held a hearing before taking the action of which review is sought by the petition, the court of appeals shall determine whether a hearing is required by law. After that determination, the court shall -

(1) remand the proceedings to the agency to hold a hearing, when a hearing is required by law;

(2) pass on the issues presented, when a hearing is not required by law

and it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or

(3) transfer the proceedings to a district court for the district in which the petitioner resides or has its principal office for a hearing and determination as if the proceedings were originally initiated in the district court, when a hearing is not required by law and a genuine issue of material fact is presented. The procedure in these cases in the district court is governed by the Federal Rules of Civil Procedure.

(c) If a party to a proceeding to review applies to the court of appeals in which the proceeding is pending for leave to adduce additional evidence and shows to

the satisfaction of the court that -

(1) the additional evidence is material; and

(2) there were reasonable grounds for failure to adduce the evidence before the agency; the court may order the additional evidence and any counter-evidence the opposite party desires to offer to be taken by the agency. The agency may modify its findings of fact, or make new findings, by reason of the additional evidence so taken, and may modify or set aside its order, and shall file in the court the additional evidence, the modified findings or new findings, and the modified order or the order setting aside the original order.

Supreme Court, U.S.
FILED
MAR 2 1994

No. 93-1232

In the Supreme Court of the United States

OCTOBER TERM, 1993

KONRADS KALEJS, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether it was reversible error for the immigration judge to admit into evidence depositions taken in the former Soviet Union.

2. Whether alleged interference by Soviet authorities with petitioner's defense justifies reversal of the order of deportation.

3. Whether the evidence is sufficient to support the findings of the Board of Immigration Appeals.

4. Whether the order of deportation should be overturned on the basis of evidence petitioner contends has been newly discovered, which the Board has not yet considered.

5. Whether the failure of the government to provide petitioner materials not in its possession justifies reversal of the order of deportation.

6. Whether petitioner's participation in persecution was sufficient to justify deportation pursuant to 8 U.S.C. 1251(a)(19) (1988) (current version at 8 U.S.C. 1251(a)(4)(D) (Supp. IV 1992).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	13
Conclusion	21

TABLE OF AUTHORITIES

Cases:

Brady v. *Maryland*, 373 U.S. 83 (1963)	18
Demjanjuk v. *Petrovsky*, 10 F.3d 338 (6th Cir. 1993)	18
INS v. *Doherty*, 112 S. Ct. 719 (1992)	18
Kungys v. *United States*, 485 U.S. 759 (1988)	5, 9, 11
Laipenieks v. *INS*, 780 F.2d 1427 (9th Cir. 1985)	20
Petkiewytsch v. *INS*, 945 F.2d 871 (6th Cir. 1991)	20
United States v. *Friedman*, 593 F.2d 109 (9th Cir. 1979)	19
United States v. *Hutcher*, 622 F.2d 1083 (2d Cir.), cert. denied, 449 U.S. 875 (1980)	19
United States v. *Molt*, 772 F.2d 366 (7th Cir. 1985), cert. denied, 475 U.S. 1081 (1986)	19
United States v. *Sprogis*, 763 F.2d 115 (9th Cir. 1985)	20
United States v. *Valenzuela-Bernal*, 458 U.S. 858 (1982)	16
Zobrest v. *Catalina Foothills School District*, 113 S. Ct. 2462 (1993)	19

Statutes, regulation, and rule:

Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978:	
§ 602, 104 Stat. 5077	2
§ 602(a), 104 Stat. 5077	2
§ 602(d), 104 Stat. 5082	2
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:	
§ 106, 8 U.S.C. 1105a	17

Statutes, regulation and rule—Continued: Page

§ 106(a)(4), 8 U.S.C. 1105a(a)(4) 18
§ 212(a)(3)(E), 8 U.S.C. 1182(a)(3)(E) (Supp. IV 1992) 17
§ 212(a)(33), 8 U.S.C. 1182(a)(33) 17
§ 212(c), 8 U.S.C. 1182(c) 17
§ 241(a)(1), 8 U.S.C. 1251(a)(1) 2, 3, 5, 9, 17
§ 241(a)(1)(A), 8 U.S.C. 1251(a)(1)(A) (Supp. IV 1992) 2
§ 241(a)(1)(B), 8 U.S.C. 1251(a)(1)(B) (Supp. IV 1992) 2
§ 241(a)(2), 8 U.S.C. 1251(a)(2) 2, 3, 5, 9, 17
§ 241(a)(4)(D), 8 U.S.C. 1251(a)(4)(D) (Supp. IV 1992) 2, 17
§ 241(a)(19), 8 U.S.C. 1251(a)(19) 2, 3, 4, 8, 9, 10, 17, 20
§ 242(b), 8 U.S.C. 1252(b) 13, 15
§ 242(b)(3), 8 U.S.C. 1252(b)(3) 13
§ 244(a), 8 U.S.C. 1254(a) (1988 & Supp. IV 1992) 17
Jencks Act, 18 U.S.C. 3500 19
8 C.F.R. 3.8 18
Fed. R. Crim. P. 16 19

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1232

KONRADS KALEJS, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-101) is reported at 10 F.3d 441. The opinion of the Board of Immigration Appeals (Pet. App. 193-393) is unreported. The opinion of the immigration judge (Pet. App. 102-192) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 1993. A petition for rehearing was denied on December 30, 1993. Pet. App. 396-397. The petition for a writ of certiorari was filed on January 31, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a challenge to an order that petitioner, an Australian citizen, be deported to Australia. Pet. App. 2-4, 195. An immigration judge found petitioner deportable under 8 U.S.C. 1251(a)(1), (2), and (19) (1988), as an alien who was excludable at entry, entered unlawfully, and assisted in Nazi persecution.[1] The Board of Immigration Appeals dismissed petitioner's appeal (Pet. App. 193-393), and the court of appeals denied petitioner's petition for review (*id.* at 1-101).

1. Petitioner was born in Latvia in 1913.[2] He was educated as a soldier and served as an officer in the Latvian military between the two World Wars. When the Soviet Union entered Latvia in 1940, petitioner initially joined its army, but he deserted when the Germans took control of Latvia a year later. At that time, petitioner joined a commando unit led by Viktors Arajs, which, among other things, assisted the German forces in the extirpation of Gypsies and Jewish individuals in Latvia and neighboring countries. Petitioner was a company commander in the Arajs Kommando and reported directly to Arajs; petitioner controlled about one hundred men. In addition to

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[1] The grounds for deportation were reorganized by Section 602(a) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 5077, and the provisions cited in the text now appear as 8 U.S.C. 1251(a)(1)(A), (1)(B), and (4)(D) (Supp. IV 1992). The reorganized grounds for deportation do not apply to this case because the 1990 Act states that the amendments set forth in Section 602 "shall not apply to deportation proceedings for which notice has been provided to the alien before March 1, 1991." § 602(d), 104 Stat. 5082.

[2] Our statement of the factual background in this paragraph summarizes the majority opinion of the court of appeals. See Pet. App. 2-3, 5-9.

other activities, a portion of the Arajs Kommando under petitioner's leadership served as guards at the Salaspils concentration camp. After World War II, petitioner fled to Australia, where he became a citizen. In 1959, he entered the United States, stating that he had been a farm laborer during the war.

2. In 1988, the INS served petitioner with an order to show cause,[3] charging that he is deportable under 8 U.S.C. 1251(a)(1), (2), and (19) (1988). Respectively, those provisions cover aliens who were excludable at entry, entered unlawfully, and assisted in Nazi persecution. After extensive hearings, and the introduction of considerable documentary evidence, the immigration judge (IJ) issued a lengthy opinion explaining his conclusion that petitioner is deportable under those statutory provisions. Pet. App. 102-192.

The IJ's opinion included a detailed summary of the evidence introduced into the record. Pet. App. 114-161. Dr. Raul Hilberg, a professor at the University of Vermont, furnished expert testimony regarding the nature of the activities carried out during World War II by the Arajs Kommando. *Id.* at 115-120. Also, the record included a number of original documents created during the war indicating that petitioner served in that unit in the manner described above. For example, Exhibit 23 is a November 1941 certificate signed by Arajs, which states that petitioner had become a member of his unit in July of 1941; Exhibit 25 is a November 1942 certificate signed by a responsible officer in the Arajs Kommando stating that pe-

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[3] The government initially issued an order to show cause in October of 1984, but petitioner fled to Canada and Australia. Petitioner subsequently returned to this country and attempted to assume a new identity, but he was arrested in Florida in April 1985. Pet. App. 2-3, 107.

titioner had been serving in that unit since July 1941, and that he had been on duty at the eastern front from February until April of 1942; and Exhibit 45 is a May 1943 note signed by petitioner stating that he was a company commander in the Arajs Kommando. *Id.* at 172, 181-182, 188-189.

Those documents and Dr. Hilberg's testimony were corroborated by testimony and depositions of individuals who had served in petitioner's unit or been imprisoned in the Salaspils concentration camp. Pet. App. 120-155. Before considering the depositions, which were taken in then-Soviet Latvia with a Latvian prosecutor as presiding officer, the judge explained that he had "viewed the results," and that he "f[ou]nd these depositions admissible as probative and not inherently untrustworthy." *Id.* at 114.

After a detailed examination of the evidence, the judge concluded that petitioner was deportable under 8 U.S.C. 1251(a)(19) as an individual who had assisted or otherwise participated in Nazi persecution. Pet. App. 166-190. That conclusion rested on, *inter alia*, the judge's factual findings that the Arajs Kommando assisted the Nazis in persecuting individuals on the basis of their race (*id.* at 169-170); that petitioner was a member of that unit during 1941, 1942, and 1943 (*id.* at 171-174); and that petitioner assisted in racial persecution during his service on the eastern front in 1942 (*id.* at 178-183), as the company commander of a guard unit that executed a band of 20-30 Gypsies in Porkhov in 1943 (*id.* at 184-187), and as the company commander of the armed exterior guard unit at the Salaspils concentration camp in 1942 and 1943 (*id.* at 187-189). At various points, the immigration judge

specifically rejected petitioner's testimony as unworthy of credence.[4]

The immigration judge also found petitioner deportable under 8 U.S.C. 1251(a)(1) and (2), based on the acknowledged fact that petitioner did not disclose the foregoing activities when he applied for a visa to immigrate to the United States. Pet. App. 190-192. The judge noted a 1984 deposition in which petitioner acknowledged that he did not "disclose his service during the war because he believed the true facts might disqualify him from obtaining his visa." *Id.* at 191. Because the IJ concluded that the misstatement "was a wilful and material misrepresentation," he concluded that petitioner was deportable as an alien who was excludable at entry (Section 1251(a)(1)) and as an alien who entered unlawfully (Section 1251(a)(2)). Pet. App. 192 (citing *Kungys* v. *United States*, 485 U.S. 759 (1988)).

3. The Board of Immigration Appeals dismissed petitioner's appeal. Pet. App. 193-393. Like the immigration judge, the Board started with a careful review of the evidence in the record. *Id.* at 201-253.

a. On the merits, the Board first rejected petitioner's claim that the immigration judge erred in admitting videotaped depositions taken in the Soviet Union. Pet. App. 253-312. The Board abjured petitioner's request that it adopt a "per se rule of inadmissibility for Soviet deposition testimony," *id.* at 265, concluding "that the

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[4] See, *e.g.*, Pet. App. 172-174 (characterizing as "self-serving" petitioner's claim that Exhibits 23 and 25 were "false and were obtained by him from friends so that he could enter the university"); *id.* at 179 (rejecting as "insufficient to rebut the convincing evidence presented by the government" petitioner's claim that prisoners taken on the eastern front were handed over to the Germans rather than executed).

most prudent approach to this question of the reliability of Soviet deposition testimony is to examine carefully the particular circumstances surrounding the depositions before determining the weight to be given the deposition testimony." *Id.* at 266. The Board identified six factors that should be analyzed:

> evidence of Soviet political interest in a case; restrictions, if any, placed on cross-examination during the depositions; the availability of the deposition witnesses' prior statements; the degree of interference or impropriety on the part of the Soviet procurator during the depositions; the accuracy of the translation of the testimony of the deposition witnesses; the extent of corroborative evidence available to substantiate the deposition testimony; and any other factors which may be indicative of the reliability of the deposition testimony.

Id. at 267.

The Board then conducted a review under that standard of the deposition testimony introduced at petitioner's deportation hearing. Pet. App. 268-287. After reviewing the relevant factors, the Board found "no error in the immigration judge's decision to accord weight to the testimony of the Soviet deponents." *Id.* at 268. The Board explained that there was no evidence in the record regarding Soviet political interest in his case (*id.* at 268-270), that petitioner's counsel, who was present at the depositions, had an adequate opportunity for cross-examination (*id.* at 270-281), that the procurator was not partial against petitioner and did not interfere improperly in the deposition process (*id.* at 281-285), that the depositions were translated reliably (*id.* at 285-286), and that there was considerable evidence corroborating the evidence provided by the depositions (*id.* at 287).

The Board also rejected a number of specific challenges petitioner raised to introduction of the depositions. For example, the Board rejected petitioner's argument that his right to cross-examine the deponents was infringed by the government's failure to produce all prior statements of the witnesses before the depositions were taken. Pet. App. 273-281. The Board noted that the government complied to the extent possible with an order of the immigration judge requiring it to make prior written statements available 60 days before the depositions, pointing out that there was "no indication in the record that [the government had not] made available to [petitioner] all protocols [*i.e.*, statements] which it received from Soviet authorities." *Id.* at 273-275. The Board also relied on the absence of any "claim that the Government withheld any protocols which may have been favorable to [petitioner]'s defense." *Id.* at 279. Accordingly, the Board rejected petitioner's objection that he could not cross-examine witnesses adequately because certain additional statements mentioned in their testimony had not been provided to him. *Id.* at 279-281. The Board further found "no basis in the record to conclude that the earlier protocols now exist, or that, assuming they do exist, their production would have assisted [petitioner] in his cross-examination * * * in any meaningful manner." *Id.* at 278. It explained that the statements in question generally resulted from interrogations made shortly after the war or in the 1950s, and that it was not clear that petitioner was discussed in the statements. *Id.* at 278-279.

The Board likewise rejected petitioner's claim that the Soviet witnesses should have been deposed in the United States. Pet. App. 287-289. The Board affirmed the immigration judge's finding that the Soviet witnesses were not available to testify at the deportation hearing, ex-

plaining that "[t]here is no indication in the record that the reasons offered by these witnesses for their inability to travel abroad were illegitimate." *Id.* at 288.

Finally, the Board rejected petitioner's claim that he was deprived of a fair hearing because his counsel was not allowed to visit the Soviet archives and the sites of the persecution in Russia. The Board stated that petitioner's arguments rested on the Federal Rules of Civil Procedure, which are inapplicable in deportation proceedings, and that, in any event, petitioner "has not demonstrated how such visits would appreciably have bolstered his preparation of a defense." Pet. App. 291-293.

b. The Board then turned to petitioner's challenge to the immigration judge's finding that he is deportable under 8 U.S.C. 1251(a)(19). Pet. App. 312-350. The Board rejected petitioner's claim that the immigration judge erred in finding petitioner's account of his war-time activities unworthy of credence. *Id.* at 316-320. Although the Board concluded that the government had failed to show by clear and convincing evidence that petitioner assisted in persecution in connection with certain incidents during the period in 1942 when he served on the eastern front (*id.* at 322-327), the Board affirmed the immigration judge's findings that petitioner had assisted in persecution during his service at Porkhov and elsewhere on the eastern front in 1943 (*id.* at 327-334) as well as at the Salaspils concentration camp (*id.* at 334-341). The Board also accepted the government's argument (which the immigration judge had rejected) that petitioner's service in the Arajs Kommando from July 1941 to January 1942 included sufficient assistance in persecution to justify deportation on that basis. *Id.* at 341-345.

c. The Board rejected petitioner's challenge to the immigration judge's conclusion that he is deportable un-

der 8 U.S.C. 1251(a)(1) and (2) based on willful misrepresentations made at the time of his entry. Pet. App. 350-392. Applying the analysis articulated by this Court in *Kungys* v. *United States*, 485 U.S. 759 (1988), the Board reasoned that petitioner's misstatement that he was a farm laborer from 1941 to 1944 was willful, relying on petitioner's later admission that he did not disclose his war-time activities because he thought the truth would bar him from coming to this country. Pet. App. 374-375. The Board also reasoned that the misrepresentation was material, in light of testimony by consular officials that, had petitioner articulated the true facts, they would have inquired further and probably have denied petitioner entry to this country. *Id.* at 375-378, 381. The Board rejected petitioner's contention that he properly could have described his occupation from 1941 to 1944 as "farm laborer," noting that petitioner obviously understood the request for information about his "occupation" to refer to military service, given his statement on the visa application that he was in the military from 1929 to 1941. *Id.* at 386-387.

4. The court of appeals sustained the Board's decision and therefore dismissed petitioner's petition for review. Pet. App. 1-101.

a. After summarizing the evidence presented at the deportation hearing (Pet. App. 5-9), the court explained that under applicable precedent in the Seventh Circuit, an individual is deportable under 8 U.S.C. 1251(a)(19) even if the government did not prove that he was personally responsible for a specified atrocity, if the government established that the person's role in the war justified an inference that he assisted in persecution. Pet. App. 11-12. The court noted, moreover, that the charges against petitioner, "if true, undoubtedly qualify as assistance in persecution." *Id.* at 13. After discussing peti-

tioner's explanation of his activities during the war, the court stated that "[t]he immigration judge and the [Board] did not believe [petitioner's] denials and neither do we." *Id.* at 17. Among other things, the court noted that it found it "incredible that [as petitioner claimed] the Germans would have continued to pay the military salary of a Latvian soldier for two-and-a-half years while he was recuperating from an ulcer, studying and laboring on a farm." *Ibid.* Accordingly, the court held that "the BIA was amply justified" in concluding that petitioner is deportable under 8 U.S.C. 1251(a)(19) based on his assistance in Nazi persecution. Pet. App. 18.

b. The court likewise affirmed the Board's conclusion that petitioner is deportable by virtue of material misrepresentations he made on immigration forms at the time he entered the United States. Pet. App. 19-27. The court noted petitioner's statement on those forms that he was a farm laborer from 1941 to 1944, as well as petitioner's concession that "this information was false or at least incomplete." *Id.* at 19. The court then rejected petitioner's "extraordinary argument that there was not space on the form to give an accurate description." *Ibid.* It explained:

> Even [petitioner] admits that he received a military salary throughout the war; he could have said "soldier" or "military" or "army" in as little space as "farm laborer." And given our conclusion that [petitioner] was actually an officer in a brutal pro-Nazi military unit, the description "farm laborer" was not even a partially accurate description of [petitioner's] activities during the war. The real reason [petitioner] decided to lie, of course, was not an absence of space on the visa application—after all, [petitioner] also had a personal interview with Amer-

> ican consular officials during which he could have given a more expansive and accurate representation of his war years—but the fear that he would not be allowed to enter the United States if his true involvement were known.

Id. at 19-20.

To consider whether the Board properly concluded that those facts justified a finding of deportability, the court applied the test articulated by this Court in *Kungys* v. *United States*, 485 U.S. 759 (1988). The court found no doubt that petitioner had made a willful misrepresentation; petitioner "admitted as much." Pet. App. 21. The court then concluded that the misrepresentation was material, explaining that State Department policy at the time petitioner entered would have required careful exploration of the war-time activities of any German collaborator, and would have led to denial of a visa to any individual "with serious involvement in Nazi activity." *Id.* at 25-26. Because true statements by petitioner "would certainly have prompted further inquiry," the statements were material. *Id.* at 26.

c. In a portion joined only by Judge Cummings, the court's lead opinion rejected petitioner's challenge to the admission of evidence at his deportation hearing. Pet. App. 27-32. It first "reject[ed] out of hand the overarching argument that any evidence flowing from the Soviets is fundamentally flawed." *Id.* at 28. The opinion then noted that petitioner "has not pointed to any reason why the Soviets would want to implicate him personally, or demonstrated any unusual interest in his case by Soviet authorities," and it referred to the corroboration of the Soviet evidence by "Western documentation, plus reliable eyewitness testimony subject to vigorous cross-examination." *Id.* at 28-29.

The lead opinion also rejected petitioner's numerous challenges to the procedures under which the Soviet depositions were held. Pet. App. 29-31. It noted that "there is no general right to discovery in a deportation hearing so long as the accused had reasonable opportunity for cross-examination, as there was here," but acknowledged that "the stakes of deportation hearings are great in terms of reputations and disruptions to lives, and we must ensure that such proceedings do not turn into kangaroo courts." *Id.* at 30. The opinion concluded, however, that "the hearings in this case were conducted with eminent fairness to [petitioner]." *Id.* at 30-31.

Finally, the lead opinion rejected petitioner's due process claims concerning the depositions as "patently ridiculous." Pet. App. 31. The court explained:

> The depositions were taken in the Soviet Union because the witnesses were too old and frail to travel to the United States. [Petitioner] did not attend because he did not ask to attend, and so waived that issue even if it had merit. The government actually did turn over to [petitioner's] counsel all witness statements it had in its possession; those witnesses for whom the United States did not have previous statements were by and large witnesses called by [petitioner] himself to corroborate his case. As noted, there is no general right to discovery in a deportation hearing, but there is certainly no right to discovery of documents that the government does not have in its possession and is unable to obtain.

Id. at 31-32.

d. Judge Manion concurred, but issued a separate opinion. Pet. App. 32-34. He accepted petitioner's argument that the Soviet deposition testimony should not

have been admitted, but concluded that "the untainted evidence supports the Board's decision." *Id.* at 33.

e. Senior District Judge Eisele dissented. Pet. App. 34-101. He reviewed the evidence in the record with considerable skepticism (*id.* at 43-73), and accepted petitioner's argument that the immigration judge should not have admitted the Soviet deposition testimony (*id.* at 73-80), because, in his view, petitioner encountered difficulties in connection with those depositions that deprived him of a "reasonable opportunity to present evidence on his own behalf" (*id.* at 81). Finally, Judge Eisele concluded that the record "does not contain enough substantial competent evidence to meet the clear and convincing standard." *Id.* at 98.

ARGUMENT

1. Petitioner's principal contention (Pet. 20-37) is that it was improper for the immigration judge (IJ), affirmed by the Board, to admit the Soviet deposition testimony into evidence at his deportation hearing. That claim is incorrect and, in any event, does not merit review.

Under 8 U.S.C. 1252(b), the Attorney General has broad discretion to devise the procedures under which a determination of deportability shall be made. Section 1252(b) contains a number of specific requirements, including that the alien "shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government." 8 U.S.C. 1252(b)(3). The procedures provided by the Attorney General in this case satisfied the statutory mandate, which in turn should satisfy any applicable constitutional requirements. In accordance with the modern trend toward broad admission of evidence, coupled with evaluation of the weight of

the evidence in light of any concerns about its accuracy, the Board properly rejected petitioner's proposal of a per se rule that would render Soviet deposition testimony inadmissible in all cases. Instead, the Board adopted a six-factor test under which the evidence is not admissible if the alien raises serious concerns regarding its reliability.

The Board carefully applied that test in this case. As we have discussed above (see pages 6-8, *supra*), the Board devoted twenty pages of its opinion to consideration of the various factors under its test, including in that consideration detailed analysis of petitioner's specific complaints regarding the circumstances of this particular case. Based on its analysis, the Board concluded that the evidence properly was admitted, generally because petitioner's objections did not establish that the evidence introduced in his case lacks substantial probative force. Pet. App. 268-287.

To the extent petitioner challenges the Board's consideration of the various factors and his specific challenges, he raises a fact-bound claim not warranting review by this Court. To the extent petitioner criticizes the legal rule adopted by the Board—that Soviet deposition testimony is admissible at immigration hearings if it satisfies the Board's six-factor test—he cannot suggest that any court of appeals has ruled that the Board must apply the blanket rule of exclusion he seeks. Because the Board adopted and applied the challenged test for the first time in this case, the Board decision to which petitioner objects is the only one in which the issue has yet arisen. Moreover, the decision below presumably does not establish the validity even in the Seventh Circuit of the Board's approach to the admission of deposition testimony taken in the former Soviet Union, because only one of the two judges who joined in

sustaining the deportation order voted to uphold the Board's approach on the deposition issue. Judge Manion believed that the evidence should have been excluded, but voted to sustain the Board's order because he found the Board's order to be supported by sufficient independent evidence. Pet. App. 32-34. Nor can petitioner claim that any of the other courts of appeals would have required exclusion of the deposition testimony on the facts of this case.[5]

Given the fact-specific nature of the Board's approach, it would be decidedly premature for the Court to review that approach without allowing the Board an opportunity to apply its test in other cases, and without awaiting consideration of the test by other courts of appeals and even by another panel of the Seventh Circuit.

2. Petitioner also contends (Pet. 37-40) that the order of deportation should be set aside because the actions of Soviet authorities impermissibly interfered with his opportunity to present a defense. Although he has made broader claims at other stages of the proceedings, his claim on this point in the certiorari petition appears to be limited to the contention that additional research in records controlled by the Soviet Union would have revealed new witnesses or prior statements of the witnesses presented by the government, and that those revelations would have changed the result of his deportation

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[5] Petitioner's statement that "[t]he Seventh Circuit stands alone in [its treatment of Soviet deposition testimony]" (Pet. 37) does not rest on any holding by any court that Soviet deposition testimony automatically should be excluded—either in district court proceedings governed by the Federal Rules of Evidence or in immigration hearings governed by the standards established under 8 U.S.C. 1252(b)—absent some particularized concern about its probative value. As petitioner's own discussion makes clear (Pet. 28-37), such testimony has been admitted in a number of other cases.

proceeding. Among the problems with that contention is petitioner's failure to did not articulate before the Board the relevance of any specific item of evidence that he would have presented. See Pet. App. 278-279, 291-293 (Board's discussion of petitioner's failure to explain how evidence would be probative). Hence, petitioner's argument rests on little more than speculation about what would have happened if he had visited the Soviet archives. Given the findings of the court of appeals (*id.* at 31-32) and the Board (*id.* at 277-279) that the United States government delivered all evidence within its control, that speculation furnishes no basis for overturning the decision of the Board. Compare *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 867-871 (1982). Petitioner does not identify any decision of any court accepting such an argument, and his claim therefore does not warrant review by this Court.

3. Petitioner also contends (Pet. 40-47) that—putting to one side the Soviet deposition testimony—the evidence was insufficient to support an order of deportation. That claim is relevant, however, only if the Court were first to determine that the Board erred in upholding the immigration judge's decision to admit the Soviet deposition evidence in this case. Accordingly, it does not provide an independent basis for review of the decision of the court of appeals.[6] Moreover, as Judge Manion concluded in his concurring opinion below, there is

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[6] Although only one judge below relied on the deposition testimony to sustain the Board's order, the government would be entitled to defend the judgment below (and the Board's decision) on the ground that the deposition testimony was properly admitted. Only if the Court rejected the government's position on that issue would the question of the sufficiency of the remaining evidence arise.

sufficient evidence to support the order of deportation even without the deposition evidence, see Pet. App. 32-34,[7] and that fact-bound claim does not in any event warrant review by this Court.

4. Petitioner argues at length (Pet. 47-54) that the Court should grant review to consider evidence that he contends has been newly discovered, even though—as he acknowledges (Pet. 48)—that evidence was not "part of the record of the immigration hearings." That claim is without merit. The proceeding before the court of appeals was brought pursuant to 8 U.S.C. 1105a to review a

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[7] Perhaps the clearest finding of persecution that is independent of Soviet deposition testimony is the finding related to petitioner's service in the Arajs Kommando from July 1941 to January 1942. The Board's conclusion that petitioner's service during that period involved persecution (Pet. App. 341-345) rests almost exclusively on the testimony of Dr. Hilberg regarding the operations of the Arajs Kommando during that period, which the court of appeals characterized as "unrebutted," *id.* at 341, together with documentary evidence that established the nature of the Kommando's operations during that period, as well as petitioner's role in those operations.

Furthermore, the Soviet deposition testimony was not necessary to the charges that petitioner made material misrepresentations at the time of his entry. Accordingly, petitioner's deportability under 8 U.S.C. 1251(a)(1) and (2) would not be affected by the absence of the Soviet deposition testimony. The finding of deportability under 8 U.S.C. 1251(a)(19) (or its current analogue at 8 U.S.C. 1251(a)(4)(D)) renders petitioner ineligible for various forms of discretionary relief available from the Attorney General, including, among other things, suspension of deportation under 8 U.S.C. 1254(a) (1988 & Supp. IV 1992). The analogous ground of exclusion (8 U.S.C. 1182(a)(33) (1988) (recodified at 8 U.S.C. 1182(a)(3)(E) (Supp. IV 1992)) would render petitioner ineligible for discretionary relief under 8 U.S.C. 1182(c). The findings of deportability under 8 U.S.C. 1251(a)(1) and (2), by contrast, do not render petitioner ineligible for discretionary relief.

final order of deportation issued by the Board. Under 8 U.S.C. 1105a(a)(4), the court must dispose of a petition for review "solely upon the administrative record upon which the deportation order is based." The proper procedural avenue to obtain consideration of any newly discovered evidence is by means of a motion to reopen before the Board. See 8 C.F.R. 3.8; *INS* v. *Doherty*, 112 S. Ct. 719, 724-725 (1992). Petitioner states (Pet. 48) that he has presented "[e]ssentially the same material" to the Board in a pending motion to reopen.[8] Accordingly, there is no basis for action by this Court to examine the proffered evidence at this stage of the proceedings.

5. Petitioner argues (Pet. 54-58) that the order of deportation should be set aside because of a violation of the principles of *Brady* v. *Maryland*, 373 U.S. 83 (1963), in the proceedings leading up to his deportation hearing. Setting to one side the fact that *Brady* applies only in criminal cases and that a deportation hearing is not a criminal proceeding,[9] it is clear that petitioner would not be entitled to relief even if the principles of *Brady* did apply here. As the court of appeals explained, the "government actually did turn over to [petitioner's] counsel all witness statements it had in its possession"; petitioner's claims relate solely to documents the gov-

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[8] The Office of Special Investigations in the Criminal Division has informed us that petitioner filed a motion to reopen on November 19, 1993, and that briefing on the motion was completed on December 23, 1993.

[9] Whatever the merits of the Sixth Circuit's belief in *Demjanjuk* v. *Petrovsky*, 10 F.3d 338, 353 (1993), that *Brady* should apply in denaturalization and extradition proceedings (see Pet. 57), that court did not refer to deportation proceedings. Accordingly, it is not at all clear that the Sixth Circuit would apply *Brady* in a case, like this one, involving deportation of an individual who has never been a United States citizen.

ernment "d[id] not have in its possession and [wa]s unable to obtain." Pet. App. 31-32. Neither *Brady* nor any other discovery rule could justify overturning an order of deportation based upon the failure to deliver such documents. See, *e.g.*, *United States* v. *Molt*, 772 F.2d 366, 371 (7th Cir. 1985) (materials in possession of cooperating *state* agency not covered by Jencks Act, 18 U.S.C. 3500), cert. denied, 475 U.S. 1081 (1986); *United States* v. *Hutcher*, 622 F.2d 1083, 1088 (2d Cir.) (materials in possession of bankruptcy court not covered by *Brady* or Jencks Act), cert. denied, 449 U.S. 875 (1980); *United States* v. *Friedman*, 593 F.2d 109, 119-120 (9th Cir. 1979) (diary of drug co-conspirator seized by Chilean government not producible under Fed. R. Crim. P. 16, *Brady*, or Jencks Act).

6. Finally, petitioner argues (Pet. 58-65) that the Seventh Circuit has adopted too lenient a standard of proof of participation in Nazi persecution and that the Seventh Circuit's standard would not be adequate to justify deportation in the Ninth and Sixth Circuits. That claim regarding the appropriate standard of proof, however, was not presented to the Board or to the court of appeals and thus is not properly before this Court. See, *e.g.*, *Zobrest* v. *Catalina Foot-hills School District*, 113 S. Ct. 2462, 2466 (1993). Moreover, for the reasons stated in our brief in opposition to the certiorari petition in *Kairys* v. *INS*, cert. denied, 113 S. Ct. 1832 (1993) (No. 92-7982) (a copy of which we have provided to counsel for petitioner), petitioner errs in contending that there is a square circuit conflict on that question.

In any event, it seems quite unlikely—accepting the factual findings of the IJ and the Board—that any court would have found petitioner's conduct insufficient to justify deportation. As discussed above, those findings included, among other things, the conclusion that he per-

sonally commanded a group of soldiers who slaughtered a group of 20-30 Gypsies in Porkhov. See Pet. App. 184-187 (findings of immigration judge), 327-334 (Board's affirmance of findings). Those findings should justify deportation under any court's construction of 8 U.S.C. 1251(a)(19). Compare *Laipenieks* v. *INS*, 750 F.2d 1427, 1431 (9th Cir. 1985) (stating that "[m]ere acquiescence and membership in an organization [were] insufficient"); *United States* v. *Sprogis*, 763 F.2d 115, 121-122 (9th Cir. 1985) (stating that "ministerial acts" and "passive accommodation" were insufficient); *Petkiewytsch* v. *INS*, 945 F.2d 871 (6th Cir. 1991) (holding that an alien who involuntarily served as a civilian guard at a labor education camp, was once imprisoned for failing to perform his duties diligently, and was exonerated by British authorities in a post-war investigation was not deportable under 8 U.S.C. 1251(a)(19)).

The Court denied review last term in *Kairys*, in which the petitioner likewise sought review of a Seventh Circuit decision and asserted a conflict with decisions of the Sixth and Ninth Circuits. There is no reason for a different disposition here, especially because petitioner did not raise the issue below and the evidence established that he played an active role as a guard commander and a "key officer" (Pet. App. A12) of a unit that engaged in widespread persecution.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 93-1232

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

KONRADS KALEJS,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER

Dated: March 11, 1994

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ADDITIONAL QUESTIONS PRESENTED BY BRIEF IN OPPOSITION

1. Whether this case should be remanded for consideration of materiality of misrepresentation.

2. Whether this case should be remanded for consideration of discretionary relief.

TABLE OF CONTENTS

ADDITIONAL QUESTIONS PRESENTED i

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATUTES INVOLVED ii

REPLY 1

I SOVIET DEPOSITIONS EXCLUDED 1

II REMAINING EVIDENCE IS INSUFFICIENT 4

III REMAND NECESSARY ON MISREPRESENTATION ISSUE AND DISCRETIONARY RELIEF 10

IV BRADY ERROR 11

V REVIEW IS NOT LIMITED TO RECORD 14

VI CONFLICT AMONG THE CIRCUITS 16

CONCLUSION 16

TABLE OF AUTHORITIES

Brady v. Maryland, 373 U.S. 83 (1963) 13

Demjanjuk v. Petrovsky, 10 F.3d 338, (6th Cir. 1993) 9, 12, 13

Fedorenko v. United States, 449 U.S. 490 (1981) 10

United States v. Kungys, 571 F.Supp. 1104 (D. N.J. 1983) 3

Laipenieks v. INS, 750 F.2d 1427 (9th Cir. 1985) 8

STATUTES INVOLVED

8 U.S.C. § 1105a(a)(4) 14

8 U.S.C. § 1252(b) 4

28 U.S.C. § 2347(c) 14

8 C.F.R. § 242.16 4

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REPLY BRIEF OF PETITIONER

I. SOVIET DEPOSITIONS EXCLUDED

Respondent repeatedly argues that Petitioner urges a *per se* rule of exclusion of all Soviet depositions. Rather, Petitioner argues the Soviet depositions should be excluded because of the unique facts es-

tablished in the record of this case. The Respondent concedes the following facts surrounding the depositions taken in the then Soviet Union of then Soviet citizens presided over by a Soviet procurator with four other Soviet prosecutors in attendance: both Petitioner and the United States were denied any opportunity for pre-deposition interviews with any of the Soviet videotape witnesses; the Soviets elected to disclose only recent written statements of its witnesses taken by the Soviets in preparation for this case and both Petitioner and the United States were denied the Soviet witnesses' written statements taken nearest the time of the events charged; both Petitioner and the United States were denied free movement within the then Soviet Union to investigate -- all investigation in this case was by the Soviet KGB or Soviet prosecutor's office; both the Petitioner and the United

States as well as Dr. Hilberg[1], Respondent's historian witness, were denied any opportunity to enter or research at Soviet controlled archives. The Respondent cannot vouch for its own witnesses with these restrictions. All documentary evidence from those archives was selected solely by the Soviet Union. Additionally, these archives contain: 1. Documentary evidence the Soviet's decided should not be introduced; 2. Exculpatory documentary evidence; 3. Undisclosed prior written statements of the Soviet selected deposition witnesses dating from near the end of World War II closest to the time of the

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[1] Dr. Hilberg, the Respondent's historian, when asked of the significance of the Soviet's certification stamp on Soviet provided documents stated: "It has no meaning in terms of whether it is an original document, whether it is a copy of a document, even whether it is a manufactured document. I don't place any credence in Soviet stamps." Trial transcript of April 15, 1983 at 363-365, United States v. Kungys, 571 F.Supp. 1104 (D. N.J. 1983).

events alleged in the Order to Show Cause. The materials uncovered subsequent to the dissolution of the Soviet Union are uniformly favorable to the Petitioner. See, Brief for Petitioner, pp. 47 through 54.

The unreasonable and unprecedented restrictions by the Soviet Union on the United States and upon your Petitioner deprived him of a fair opportunity to be heard, cross examine and prepare a defense contrary to due process and contrary to the intent of 8 U.S.C. § 1252(b) and 8 C.F.R. § 242.16 [reasonable opportunity to examine the evidence, to present evidence in his own behalf and to cross-examine].

II REMAINING EVIDENCE IS INSUFFICIENT

Two of the three judges of the Seventh Circuit found the Soviet depositions unreliable and inadmissible. Without crediting these Soviet witnesses there is no evidence [neither testimonial nor documentary] remaining in the record of

Petitioner's alleged assignments as commander of the external guard at Salaspils and Sauriesi Concentration Camps[2]; no evidence of an assignment at a camp for Jews at Porkov, nor of an assignment that involved a unit killing a group of gypsies; nor is there any "eyewitness" identification of Petitioner as a member of Arajs Kommando.

The sole evidence remaining was an admitted assignment with a detachment of Latvian ski troops at the Eastern Front in 1942. BIA held those duties did not constitute participation in persecution.

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[2] Respondent closes its brief in opposition by claiming Petitioner played an active role as a guard commander and a "key officer." The sole evidence admitted bearing of this issue are several of the Soviet depositions. Respondent's contention is much like the Seventh Circuit's "lead" opinion that stated it will not discard a case against a Nazi collaborator merely because some of the evidence originated in the Soviet Union. As the dissent pointed out this assumes the petitioner's guilt when that is precisely what is in issue. (Pet. App. 78).

(Pet. App. 326,7). In spite of this the Seventh Circuit ordered Petitioner deported for participation in persecution.

Judge Manion joined the "lead" opinion with the simple yet unelaborated statement, "I think the untainted evidence supports the Board's decision." The "untainted" evidence is, and can only be, evidence other than the Soviet depositions Seventh Circuit Judges Manion and Eisele believed inadmissible. Respondent in its Brief in Opposition succinctly states what this evidence is:

> "Perhaps the clearest finding of persecution that is independent of Soviet deposition testimony is the finding related to petitioner's service in the Arajs Kommando from July 1941 to January 1942. The Board's conclusion that petitioner's service during that period involved persecution (Pet. App. 341-345) rests almost exclusively on the testimony of Dr. Hilberg regarding the operations of the Arajs Kommando during that period, which the court of appeals characterized as "unrebutted," *id.* at 341, together with documentary evidence that established the nature of the Kommando's operation during that period, as well as petitioner's role in those operations."

Footnote 7, Brief in Opposition, page 17.

The Board of Immigration Appeals agreed with the Respondent. However, this quoted portion of the Respondent's Brief is factually inexact. The last phrase is wholly false -- "as well as petitioner's role in those operations" is totally unsupported by any documentary evidence or, for that matter, "eyewitness" testimony. On this very point -- what Respondent calls the clearest instance of proof of Petitioner's participation in persecution -- the Immigration Judge stated:

> "No witness, including (Soviets) Leonids Jansons and Rolands Bahsteins, the only witnesses to identify Kalejs as a member of the Security Police during this period, and no documentary evidence presented, identified the respondent as holding some position with the Arajs Kommando prior to January 1942. [a detachment of Latvian troops at the Eastern Front] . . . the evidence reflects that the respondent signed his name to the rolls of the Arajs Kommando in July [1941]. **There is no evidence of participation or assistance beyond this act . . .**"

[Emphasis Supplied] (App. 175,6)

In this "clearest" instance -- and the only one supported at all without Soviet deposition evidence -- the Board of Immigration Appeals and the Immigration Judge reached opposite results. In Laipenieks v. INS, 750 F.2d 1427 (9th Cir. 1985), the Ninth Circuit was faced with a similar situation of incongruity of the findings between the Immigration Judge and the Board of Immigration Appeals. In reversing the decision of the Board of Immigration Appeals the court stated:

> "We first note that in a deportation case, the INS has the burden of proving its case by clear, convincing and unequivocal evidence which does not leave the issue in doubt. . . . On review, we must consider whether there is reasonable, substantial and probative evidence in the record, when considered as a whole, to support a finding that each material fact has been established by clear, convincing and unequivocal evidence. . . . However, this court has observed that in a situation where the hearing examiner and the Agency have reached opposite results, the appellate court's reviewing eye may be more searching . . . Even when there is independent, credited evidence of the Board's decision, a reviewing court will

> scrutinize the Board's findings of fact more critically if they contradict the ALJ's factual conclusions than if they are in accord with the ALJ's findings." 750 F.2d at 1429.

The incongruity of findings requires, or at least permits, the Court to scrutinize the findings here more critically. The Seventh Circuit failed to take a searching or critical look at this issue. Perhaps if Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993) with its revelation of fraud perpetrated on that court by attorneys from the office prosecuting this case, had been decided sooner, the Seventh Circuit may have taken a more searching and critical look. Should the Court find participation in persecution was insufficiently supported by reasonable, substantial and probative evidence, the matter should be remanded concerning the misrepresentation issue.

III REMAND NECESSARY ON MISREPRESENTATION ISSUE AND DISCRETIONARY RELIEF

On his visa application Petitioner failed to disclose his admitted military service on behalf of the Germans.[3] The Board of Immigration Appeals held his admitted service in a detachment of Latvian ski troops at the Eastern Front did not constitute participation in persecution within the meaning of the Holtzman Amendent (Pet. App. 326,7). He may, or may not, be deportable on the material misrepresentation count alone depending upon a determination of materiality to be made that does not depend upon a finding

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[3] Petitioner had been interned in a displaced persons camp following the War. The Displaced Persons Act denied relief to persons who had assisted the enemy forces. Service in a detachment of Latvian Ski troops and in the Latvian Legion may have disqualified him under the DPA. See, Fedorenko v. United States, 449 U.S. 490 (1981). However, Petitioner was not admitted under the DPA. He was admitted as a regular quota immigrant where such service does not constitute a disqualification. Petitioner's expressed belief that he would not have been eligible for immigration is not relevant to whether he was in fact disqualified.

of participation in persecution. This issue was not decided below since the lower tribunals erroneously found Petitioner participated in persecution.

Furthermore, when a finding of deportability rests on material misrepresentation alone Petitioner is eligible for discretionary relief. See Brief for the Respondent in Opposition, page 17, footnote 7. Petitioner's request for discretionary relief was simply denied by the Immigration Judge based upon the finding of participation in persecution. With the finding of participation in persecution insufficiently supported, a hearing is required before the Immigration Judge on two issues: 1. Materiality of the misrepresentation and, if the misrepresentation is found to be material; 2. Whether discretionary relief should be granted.

IV <u>BRADY</u> ERROR

Respondent recognizing the exculpatory

nature of the undisclosed numerous prior written statements of the Soviet depositions witnesses defends on the basis that the Respondent did not have those statements. But, the Respondent does not attempt to defend its failure to produce the book, SALASPILS DEATH CAMP. This book names a 1st Lt. Tone as commander of the external guard at Salaspils. It does not name the Petitioner as commander of the external guard at Salaspils. This evidence withheld by Respondent would have substantially aided in undermining Respondent's most emotional argument that Petitioner was a "guard commander and a "key officer." The Respondent had this book in its possession at the time the Soviet depositions were taken in the Soviet Union and extracted a copy of just one page of that book as evidence in this case. Subsequently, the Petitioner obtained a copy of this book. Respondent should have, but

failed, to produced this book pursuant to Petitioner's request under Brady v. Maryland, 373 U.S. 83 (1963). In Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993), the Sixth Circuit found several of Respondent's attorneys from the same prosecuting office engaged in this case guilty of fraud for withholding exculpatory evidence. The avenue to the new evidence that saved Mr. Demjanjuk from wrongfully hanging in Israel included additional materials gathered after the fall of the Soviet Union. These materials were only the tip of the iceberg. In Demjanjuk, the former Director of the Office Special Investigations (OSI), Ryan, testified it is "fundamentally unfair" not to follow the Brady principle in OSI cases. Ryan testified he intended his office make full disclosure of exculpatory material. The basis of the Order to Show Cause and the decisions below against Petitioner charge

him with the commission of war crimes. The OSI director's interpretation of required fundamental fairness -- which his former office refuses to follow -- in OSI cases is persuasive.

V REVIEW IS NOT LIMITED TO RECORD

Respondent states that 8 U.S.C. § 1105a(a)(4) limits a court's review "solely upon the administrative record ..." However, 28 U.S.C. § 2347(c) provides:

> "If a party to a proceeding to review applies to the court of appeals in which the proceeding is pending for leave to adduce additional evidence and shows to the satisfaction of the court that -
> (1) the additional evidence is material; and
> (2) there were reasonable grounds for failure to adduce the evidence before the agency; the court may order the additional evidence . . . to be taken by the agency . . ."

Such application was made to the court of appeals without ruling. Such application was made to the Court. See, Brief for Petitioner, page 54. The materials lodged with Justice Stevens with Petition-

er's application for stay and bond demonstrate substantial materiality. The iron curtain's existence and the raging of the cold war prior to and throughout the hearings below constitutes reasonable grounds for failure to adduce the evidence below that was secreted by the Soviet Union.

A remand to the Agency to take additional evidence is provident for two reasons. Firstly, there is judicial economy in avoiding proceeding with the Petition to Reopen that was filed last year with the Board of Immigration Appeals and then through subsequent appeals of the Board's decision on that petition via the usual appellate routes. Secondly, Respondent's attorneys in what they term a "Nazi War Criminal" case, as this writer has experienced, proceed not with a bag and baggage letter with a demand for surrender at a time and place certain, but rather proceed with surrounding a person's home at 5:00

a.m. the morning following denial of certiorari with arrest and incarceration. The Petitioner is 80 years of age suffering from cancer and has had deposited $750,000, 100%, cash bond.

VI CONFLICT AMONG THE CIRCUITS

The Respondent has referred the Court to their Brief for the Respondent in Opposition filed in Liudas Kairys v. Immigration and Naturalization Service, October Term, 1992, 92-7982, for their position on the issue of the conflict among the circuit courts regarding what constitutes participation in persecution under the Holtzman Amendment. The Brief filed in the Court for Kairys and his Reply are commended to the Court.

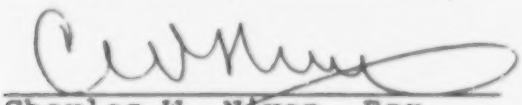
CONCLUSION

The Court should exercise its supervisory power to insure uniformity among the Circuits and insure vital procedural and evidentiary standards are respected below.

A writ of certiorari should issue.

Dated: March 11, 1994

Respectfully submitted,



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